In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-6520

KINNEY KINMON LAU, et al., *Petitioners*,

vs.

ALAN H. NICHOLS, et al., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

I. INTRODUCTION

Certiorari in this case has been issued to review e decision of the Ninth Circuit upholding a ruling the District Court finding for the respondents on e merits. Appendix 115. It was stipulated by the rties and found by the Court that more than 2,800 udents in the San Francisco Unified School District ed special instruction in English, in addition to rmal English instruction. A substantial number of ose students was not receiving the needed special struction. Appendix 113-114. The Court additionally und that the "Defendants recognize the importance an education and equal educational opportunities

and make education available to petitioners on the same terms and conditions as it is available to other groups within the School District." Appendix 114. The Court made an additional finding that there had been some efforts to set up remedial education programs. Appendix 114. The respondents submit that these programs are relevant to the issues in this case, insofar as they reflect on the good faith of the respondents (and the absence of discriminatory intent) and as they cast light on the complexity and magnitude of the problems confronting the school district. The scope of the problem speaks strongly for the contention of the respondents that the solution thereto lies with the elected officials and their administrators rather than with the Court.

This is not a case of racial discrimination and should not be viewed as such. Rather, it is a case of a substantial number of students with a language difficulty which is directly related to the accidents of birth—national origin, native tongue of parents, and exposure to ambient verbal communications in other tongues than English. It is a difficulty not of the school district's making. This case might be viewed as one in which the respondents are being called forward to justify their failure to provide special extraordinary assistance to the petitioners in eliminating their unique language problems. Here, too, the respondents object. The issue should not turn on whether the respondents should have satisfied the petitioners' needs. Such a question is to be resolved by legislative authority. The respondents submit that they are bound, under the Fourteenth Amendment, to

rove that their state scheme of public instruction
nd their administration of it are reasonably related
the legitimate state objective of educating its
tizens.

Much of the argument of the petitioners and most
the amici's briefs discuss the socio-economic plight
the Chinese person and relate it to his inability
speak English. The respondents have admitted
ese facts and respondents are devoting a substantial
ortion of their financial resources and educational
xpertise toward finding meaningful solutions to the
roblems of the many students in the district who
peak languages other than English.

This Court under the Constitution is not vested
ith the power to review, evaluate, select and enforce
he proposed solutions to citizens' problems. There-
ore, at the outset the respondents remind this Court
hat the sole issues in this case are constitutional and
elate to the duties of the respondents under the
ourteenth Amendment.

II. DISTRICT COURT AND COURT OF APPEALS DECISIONS

The District Court reached the following conclusion
of law:

> "This Court fully recognizes that the Chinese-speaking students involved in this action have special needs, specifically the need to have special instruction in English. To provide such special instruction would be a desirable and commendable approach to take. Yet, this Court cannot say that

such an approach is legally required. On the contrary, plaintiffs herein seek relief for a special need—which they allege is necessary if their rights to an education and equal educational opportunities are to be received—that does not constitute a right which would create a duty on defendants' part to act. These Chinese-speaking students—by receiving the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District—are legally receiving all their rights to an education and to equal educational opportunities. Their special needs, however acute, do not accord them special rights above those granted other students." Appendix 114-115.

The Court of Appeals ruled,

"Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to a 'denial' by the Board of educational opportunities within the meaning of the Fourteenth Amendment should the Board fail to give them special attention, this even though they are characteristic of a particular ethnic group. Before the Board may be found to unconstitutionally deny special remedial attention to such deficiencies there must be found a constitutional duty to provide them.

However commendable and socially desirable it might be for the School District to provide special

remedial educational programs to disadvantaged students in those areas, or to provide better clothing or food to enable them to more easily adjust themselves to their educational environment, we find no constitutional or statutory basis upon which we can mandate that these things be done.

Because we find that the language deficiency suffered by appellants was not caused directly or indirectly by any State action, we agree with the judgment of the district court and distinguish this case from *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny of de jure cases. Under the facts of this case, appellees responsibility to appellants under the Equal Protection Clause extends no further than to provide them with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district. There is no evidence that this duty has not been discharged.

Furthermore, the determination of what special educational difficulties faced by some students within a State or School District will be afforded extraordinary curative action, and the intensity of the measures to be taken, is a complex decision, calling for significant amounts of executive and legislative expertise and nonjudicial value judgments. As with welfare, (to which these claims are closely akin), the needs of the citizens must to reconciled with the finite resources available to meet those needs. *See Dandridge v. Williams*, 397 U.S. at 472.

As long as there is no discrimination by race or national origin, as has neither been alleged nor shown by appellants with respect to this

issue, the States should be free to set their educational policies, including special programs to meet special needs, with limited judicial intervention to decide among competing demands upon the resources at their commands, subject only to the requirement that their classifications be rationally related to the purposes for which they are created." Appendix, pp. 126-129.

III. ISSUES

There are three issues before this Court:

(1) Does the Equal Protection or Due Process Clause of the Fourteenth Amendment impose a duty on the respondents to undertake affirmative action so as to provide special, extraordinary assistance to the petitioners by teaching them English where there is no showing that the state either directly or indirectly caused the language disability which impairs the capacity of the petitioners fully to understand or communicate in the language of classroom instruction.[1]

(2) Does the failure of respondents to provide special assistance to the petitioners violate Section 601 of the Civil Rights Act, Title 42, Sections 2000d, 2000d-1 and the regulations adopted pursuant thereto.

(3) May the Department of Health, Education and Welfare [hereinafter referred to as

[1]As discussed subsequently, the respondents consider any claim of the petitioners to an invasion of their "First Amendment" rights to be embraced by the Due Process Clause of the Fourteenth Amendment. It should be noted that the petitioners, in their complaint, did not allege any violation of First Amendment Rights.

HEW] pursuant to the powers vested in it by Section 601 of Title VI of the Civil Rights Act (Title 42, Section 2000d-1) adopt regulations which enable it to compel the respondents to provide special English instruction to non-English speaking students.

IV. SUMMARY OF ARGUMENT

The analysis of this Court must be directed at that rtion of the Fourteenth Amendment which *pro-bits* a state from denying equal protection of the ws as it (the Fourteenth Amendment) is applied the decision of the state to provide free, compul-ry public education in English. Since it is clear at there has been no invidious intent, the state has ot made a "suspect classification" nor does this case nvolve a fundamental right. Therefore, this Court ust view the relevant state action (the provision f free public instruction) in terms of its reasonable-ess in relation to legitimate state purposes. The Court's review should be tempered by the well recog-nized constitutional principle that a state's attempt o provide a social benefit is not rendered invalid merely because the state could have done more or because the legislation is imperfect. Something more than "racial imbalance" or hardship on an "insular minority" is needed to justify judicial interference with a state's social policies and educational programs.

Underlying this case is the fundamental concept of the political organization of our society and the al-

location of power in it. Petitions relating to urgent social needs must be addressed to the elected representatives of the people and not to the Courts which have no legitimate business in reviewing the demands made on public resources and allocating those resources on the basis of priorities.

The decision to conduct public education in English is reasonably related to the legitimate purpose of providing general education to the population. The fact that some residents cannot understand or speak English does not render that decision capricious or arbitrary. Just as there is no fundamental right or suspect classification, there is no basis for compelling affirmative action to remedy disabilities for which the state cannot properly be held accountable. In the instant case, the petitioners' disabilities are caused by the accident of birth and are not related to any district policies. The Court has refused to abolish the distinction between de facto and de jure segregation, and likewise absent intentional discrimination, no affirmative action may be compelled in the instant case. The Fourteenth Amendment does not impose a duty on the states to equalize differences between citizens.

The Civil Rights Act has not been violated by the respondents because that act prohibits *intentional discrimination on the basis of race*. The Civil Rights Act was enacted pursuant to the delegation of power set forth in the Fourteenth Amendment and only prohibits activities which constitute constitutional violations. Thus, if the respondents' activities do not

violate the Constitution, there can be no violation of the Civil Rights Act. Likewise, the HEW regulations adopted pursuant to the delegation of authority set forth in the Civil Rights Act can only prohibit or require affirmative action relating to constitutional violations. This is the extent of the regulations application. Should they be interpreted to extend beyond regulating constitutional violations, then they have been adopted in excess of the congressional delegation of authority and are invalid.

In conclusion, the respondents have acted reasonably in setting up a scheme of public instruction and operating it in English. They have not violated the Constitution simply because there are additional, unsolved educational problems.

V. DOES THE FOURTEENTH AMENDMENT REQUIRE THE STATE TO PROVIDE SPECIAL ASSISTANCE TO CHILDREN WHO DO NOT SPEAK ENGLISH ADEQUATELY?

A. Before A Review Of State Action Can Be Made, The State Action Must Be Identified. That State Action Is The Provision, By The State, Of Free Public Education.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "... *No state shall* make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; *nor shall any state deprive* any person of life, liberty, or property, without due process of law; *nor deny* to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

A premise of equal protection review of state action is the action itself. Thus, an important issue in each case and, indeed, a necessary element of a cause of action alleging a violation of Fourteenth Amendment rights is the requirement that the plaintiff allege and prove that the state *acted* in such a way as to deprive him equal protection of the laws.

In *Burton v. Wilmington Parking Authority,* 365 U.S. 715, the critical question was whether the state could be deemed to have acted to deny the plaintiffs' right to equal protection of the laws where the state leased a coffee shop in a public garage to a private tenant who discriminated against the plaintiffs because of their race.

In *Shelley v. Kraemer,* 334 U.S. 1, 13, this Court referred to the Civil Rights Cases, 109 U.S. 3, wherein the Court recognized as "imbedded in our constitutional law" the principle "that the action inhibited by the first section [Equal Protection Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the states." Therefore, in *Burton v. Wilmington, supra,* at page 724, the Court recognized that the [private] restaurant operated as an integral part of a public building indicating "that degree of state participation and involvement in discriminating action which it was the design of the Fourteenth Amendment to condemn." Therefore, the Court concluded, at page 725:

> "[N]o state may effectively abdicate its responsibilities by either ignoring them or merely failing to discharge them whatever the motive may be."

In *Reitman v. Mulkey,* 387 U.S. 369 (1966) this Court also found unconstitutional state action by accepting the conclusion of the California Supreme Court that Article I, §26, of the State Constitution did not merely repeal existing law forbidding racial discrimination in housing but that it was intended to establish the right to discriminate as a basic state policy and involved the state in private discriminations. Similar analysis was pursued in *Nixon v. Condon,* 286 U.S. 73 (1931); *Lombard v. Louisiana,* 373 U.S. 267 (1962), and *McCabe v. Atchison, Topeka & Santa Fe R. Co.* 235 U.S. 151 (1914.) Thus, contrary to the petitioners' contention, the Court in *Reitman, Burton* and *Shelley* was concerned with more than the mere "ultimate effect."

Those cases share the common characteristic of incontestable state involvement in intentional discrimination on account of race. In the instant case the disability of the petitioners is not the product of intentional discriminatory state purpose directed at them. On the contrary, in this case their problems relating to their national origin are merely an unfortunate incident of the application and administration of the state's decision to provide free public education to be conducted in English. In *Moose Lodge v. Irvis,* 407 U.S. 163 (1972), this Court emphasized the importance of the Fourteenth Amendment's requirement of state action by holding that state involvement with a discriminating private party through the granting of a liquor license and the comprehensive regulation of the license is not sufficient

to constitute state action. It was admitted in *Irvis* that the private individuals intended to discriminate and yet the Court refused to hold the state accountable for improper but not unconstitutional private intentions merely because the state granted the private parties a license to operate their bar.

Therefore, the line has been drawn and the initial element common to all cases where the state has been held accountable for private discrimination is a finding that the state's *intention* is to encourage or enforce private discrimination. There has been no allegation or showing of such an intention in the instant case.

It is therefore important to identify the state action in this case and then evaluate it based on the established constitutional principles. The basic state action which must be examined in this case is the decision of the legislature to provide public education for all its school age residents and to make English the basic language of instruction in all schools. Section 71 of the California Education Code.

The question here arises because there are some residents who, because of accident of birth, do not speak English as their native tongue, do not hear English spoken in their homes, and therefore are not able fully to understand the language spoken in the schools.

The review of the trial court was therefore framed in terms of the reasonableness of the policies designed to make free public education available to all to be

onducted in the English language. The Ninth Circuit lso viewed the issue in these terms and, it is submitted, so should this Court.

1. Since Free Public Education Is A Service Provided By The State, The Petitioners May Not Compel The State To Provide Them With Special Instruction To Remedy Their Own Personal Problems.

It is important, then to recognize that the identifiable *state action* in this case is the *provision of free public education* to be conducted in English. It is submitted that public education has historically been one of the important functions of the state; however, it is a service which the state provides as a matter of choice and not by virtue of constitutional compulsion. Said this Court, in *Brown v. Board of Education, supra,* at page 493:

> "Such an opportunity [to an education] *where the state has undertaken to provide it,* is a right which must be made available to all on equal terms." (Emphasis added.)

This concept that the state may choose whether to provide a free public education was reaffirmed in *San Antonio Independent School District v. Rodriguez,* 93 S.Ct. 1278, 1297, 1298, where this Court held:

> "Education, of course, is *not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.* As we have said, the undisputed importance of education will not alone cause this court to depart from the usual standard for reviewing a state's social and economic legislation." (Emphasis added.)

The petitioners are not challenging the scheme of public instruction in California on the basis of its general structure or effectiveness. What they contend is that the state has not gone far enough in carrying out its decision to make available general, free public instruction. They contend that this decision means nothing to persons in the petitioners class who cannot speak English. The defendants concede that special English instruction or even a bilingual course of study is an acceptable and, indeed, valuable educational device.[2] Neither the relative importance of the state service nor the need for remedial measures (English as a second language, or bilingual programs) vests a constitutional right in the petitioners to demand that the School District provide a remedy for their problems.

In *Katzenbach v. Morgan,* 384 U.S. 641, the Court discussed this very point at pages 656-657:

> "This is not a complaint that Congress . . . has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the relief effected [to others similarly situated]. . . .
>
> "[The Federal law in question] does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. . . . We need decide only whether the challenged limitation on the relief

[2]The Court should note that the respondents have in fact been pioneers in the field of bilingual instruction. See discussion *infra* pages 49-52. The respondents recognize the educational value of special assistance instruction to non-English speaking students. The issue here only relates to *constitutional duty* and not to social or educational desirability.

> effected . . . was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in law *denying* fundamental rights . . . is inapplicable; for the distinction challenged by the appellees is presented *only as a limitation on a reform measure* . . . Rather in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute' is not invalid under the Constitution because it might have gone farther than it did, . . . that a legislature need not strike at all evils at the same time, . . . and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . ." (Citations omitted, emphasis added.)

Likewise, free public education in California is a reform measure directed at improving the level of knowledge and the capacity of the electorate to make intelligent decisions. Such social assets are essential in a democracy. The petitioners contend that the state has not gone far enough. They do not question the general proposition that a state may establish a system of public education decreeing that the courses shall be conducted in English. What they contend is that, in addition to the general public instruction, the state, under the Fourteenth Amendment, has an affirmative duty to provide them with special assistance in English.

The state legislature in the instant case could have imposed such a duty on the defendants but did not.[3]

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[3]See discussion infra re legislative history of Section 71 of the Education Code.

No such duty is imposed by the Constitution, and therefore the plaintiffs are possessed of no enforceable right. The Ninth Circuit affirmed this principle in its opinion when it recognized that determinations regarding how best to educate the citizens are appropriately left to legislators and are not properly a judicial function. Appendix p. 129.

Additionally, it is a well recognized principle of Equal Protection law that the Fourteenth Amendment does not require a state to "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams,* 397 U.S. at 486-487. In *McDonald v. Board of Election Commissioners,* 394 U.S. 802 (1969), the plaintiffs, unsentenced inmates of Cook County Jail, challenged Illinois absentee ballot laws on the ground that they failed to extend relief to the plaintiffs while making available absentee ballots to those physically incapacitated for medical reasons.

The Court's opinion was premised on the principle that no one has a right to an absentee ballot. Said the Court at page 807:

> "It is thus not the right to vote that is at stake here but a *claimed right* to receive absentee ballots." (Emphasis added.)

Likewise, in the instant case the right to an education is not in stake here but rather a "claimed right" to receive special English instruction.[4]

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[4]It should additionally be recognized that the "right to vote" asserted in *McDonald* has been recognized as a "constitutionally protected right [of every citizen] to participate in elections on an

Then the Court stated, in *McDonald, supra,* at page 809:

> "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds are silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. [Citations omitted.] . . . With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phrase of the problem *which seems most acute to the legislative mind.' Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489 (1955), and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertance or otherwise, to cover every evil that might conceivably have been attacked. . . ." (Emphasis added.)

And so in the instant case the decision to provide general, free public instruction in the language spoken by most of the citizens of the state and, indeed, the official language, most probably was intended to "address" itself to the phase of the problem (the need of citizens, the majority of whom speak English, for an

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equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein,* 405 U.S. 330, 336 (1972). As discussed earlier on, *Rodriguez supra,* specifically held that there is no fundamental right to an education as such. Thus, if the Court in *McDonald, supra* refused to compel the state to take remedial steps in order to provide the plaintiffs in that case with special absentee ballot procedures so as to insure them the maximum benefits of their right to vote, it hardly follows that the court in the instant case erred in refusing to compel the respondents to undertake affirmative action so as to provide the petitioners with special English instruction thereby insuring for them the maximum benefits of their educational opportunity which, though important, had been held not to be a fundamental right.

education) which seemed most acute to the legislative mind.

In *McDonald,* the Court recognized that

> "Illinois could, of course, make voting easier for all concerned by extending absentee voting privileges to those in appellants' class."
>
> *McDonald v. Board of Election Commissioners, supra,* p. 809.

Similarly, California could, of course, make education more beneficial for all concerned by establishing mandatory bilingual education or English as a Second Language (hereafter called ESL) for all non-English speaking students. As discussed later on, California chose not to adopt such a policy. The petitioners' fundamental right to petition the government for a redress of their grievances by making their problem seem most acute to the legislative mind was exercised. The legislative history (discussed *infra)* of Section 71 of the Education Code reveals that the legislature has heard petitioners and has provided some relief by "authorizing" bilingual instruction. The legislature obviously concluded that the petitioners' problem was not so acute in relation to other demands for redress of social problems as to justify granting them a right to the special instruction they need. See also *Schlib v. Kuebel,* 404 U.S. 357, 364-368 (1971), rehearing den., 405 U.S. 948 (1972).

In essence, the Court held in *McDonald, supra,* that the *"claimed right"* to absentee ballots was unfounded; and the Court noted in its conclusion that Illinois had only become embroiled in litigation be-

cause of its "willingness to go farther than many states." Additionally, *McDonald* can be viewed as a more extreme example because the plaintiffs contended that the state, in making the *right* to the absentee ballot available to some citizens who could not come to the polls, had violated the rights of the plaintiffs who, likewise though for different reasons, could not come to the polls.

In the instant case state law has *authorized*[5] local districts to set bilingual programs into operation; however, it has not extended the *right* to such a program to any citizens. If the constitution does not impose a duty to extend the absentee ballot to all incapacitated citizens, once some classes have obtained it, it follows in this case that the Constitution creates no duty to provide special instruction when the state has given no right to such special instruction to any residents.

An additional point should be emphasized. In *McDonald* the plaintiffs contended that the state had interfered with their right to vote. The Court recognized that the question did not relate to the interference by statutory scheme with the right to vote. Rather, the Court said the question related to the "claimed right to receive absentee ballot." *McDonald v. Board of Elections, supra,* 807. Likewise in the instant case the petitioners "charge precisely such an absolute denial of educational opportunity." However, it is submitted that the issue in this case relates to the *claimed right* to special English instruction. In

[5]See discussion infra, pages 39-40.

accord with the Court in *McDonald,* it is submitted that the state, in making the right to education generally available, does not vest the right to special instruction in those students because of their disabilities of which the state is not deemed a responsible cause.

C. The Compelling Interest Standard Is Not Appropriate In This Case Because There Is No Discriminatory Intent And There Has Been No Classification Scheme Based On National Origin.

The Ninth Circuit, contrary to the appellants' contention that it was not "explicitly explained" did set forth the appropriate standard of judicial review. PB 33. The Court ruled,

> "As long as there is no discrimination by race or national origin, as has neither been alleged nor shown by appellants with respect to this issue, the States should be free to set their educational policies, including special programs to meet special needs, with limited judicial intervention to decide among competing demands upon the resources at their commands, *subject only to the requirement that their classifications be rationally related to the purposes for which they are created.*" (Emphasis added.)
>
> Appendix, page 129.

The petitioners concede in their brief that the District has not erected physical barriers at the school house door, and argue that in *failing* to make a classification which, in essence, sets them apart and accords to them special treatment on the basis of their language

difficulties, the respondents have created a suspect classification. PB 14.

It is submitted that discriminatory purpose to classify on the basis of national origin is a necessary prerequisite to the imposition of the compelling interest standard. This was the ruling in *Keyes, infra,* and *Rodriguez, supra.* The Court spoke, in *Rodriguez,* at page 1294, of "purposeful unequal treatment," and *Brown, supra,* also invalidated a state classification scheme based solely on race. See also *Sweatt v. Painter,* 339 U.S. 629 (1950), and *McLaurin v. Oklahoma,* 339 U.S. 637 (1950), in which Negroes were excluded from a white law school, or segregated from whites in graduate school. No such scheme can be identified in the instant case. Whereas the color of a man's skin bore no relationship to legitimate educational objectives, the decision to provide public education in English is directly and reasonably related to the objective of providing general public education.

If the defendants had passed a law prohibiting children of Chinese ancestry or Chinese speaking children who cannot speak English from attending school, then there would be a suspect classification.

In *Yick Wo v. Hopkins,* 118 U.S. 356 (1885), the Court stated, at page 373:

> ". . . For the cases present the ordinance in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinance as adopted, they are applied by the public authorities charged with

> their administration . . . *with a mind so unequal and oppressive as to amount to a practical denial* . . . of . . . equal protection of the laws. . . . Though the law itself be fair on its face . . . *if it is applied and administered by public authority with an evil eye and an unequal hand. . . .*" (Emphasis added.)

In the present case, there was no evidence in the record before the Court to support the conclusion that the State Education Code, and in particular Section 71 thereof, were enforced with an unequal or an oppressive mind, an evil eye, or an unequal hand.

In *Yu Cong Eng v. Trinidad,* 271 U.S. 500, 515, the Court stated:

> ". . . nor is there any doubt that the act . . . was chiefly directed at the Chinese merchants. . . ."

And the Court concluded, at page 528:

> ". . . As against the Chinese merchants of the Philippines, we think the present law which deprives them of something indispensable to the carrying on of their business, *and is obviously intended directly to affect them* as distinguished from the rest of the community, . . ." (Emphasis added.)

There was no evidence presented to the District Court to support the conclusion that the scheme of public instruction requiring the teaching of English in public schools was "chiefly directed" at Chinese speaking students (or students of any other non-English speaking ethnic origin), nor was it intended to "affect them as distinguished from" other students.

The respondents do not dispute that the persons of Chinese origin are an identifiable ethnic minority; however, what they do dispute is the suggestion that the state *acted* in any way to deprive them of opportunities on the basis of their nationality. As explained above, the very essence of the petitioners' contention is that the state did not set them aside on the basis of their linguistic disabilities which the petitioners contend is tantamount to identifying their ethnic identity.[6]

The strongest repudiation of any alleged evil purpose can be found in another decision of Judge Burke rendered in the case of *Berkelman v. San Francisco Unified School District,* C-71 1875 LHB.[7] The case is presently on appeal to the Ninth Circuit Number 73-1686; however, Judge Burke's Findings of Fact have not been challenged in that case. Judge Burke, in reviewing the evidence, made the following finding of fact (Respondents' Appendix A, p. 8):

> "The percentages of various groups at Lowell as compared with the percentages of such groups in the district at large are these: twenty-nine and eight-tenths percent of Lowell's students are

[6]It is also not necessarily true that ethnic origin and language disabilities are coterminous. There are many Chinese students in the District who speak English well and succeed. Likewise, a non-Oriental could conceivably be born in the Oriental millieu and be unable to speak any language except Chinese. Thus, not only is there no discriminatory purpose directed against Chinese speaking students, but, also, it is not clear that there is an identity between racial origin and native tongue.

[7]Respondents' Appendix A contains a copy of Judge Burke's Memorandum of Opinion and Order of Summary Judgment.

Chinese; the District all-high school percentage is 17.9%."[8]

It is therefore patent that a substantial number of Chinese students excel in the San Francisco Unified School District.

The petitioners' complaint is replete with allegations relating to "newly arrived immigrants."[9] Their complaint, combined with the total absence in it of any allegations of invidious or discriminatory purpose substantiates the respondents' contention and, indeed, the inevitable conclusion of both Courts below, that the language disability of the petitioners is directly related to their status as immigrants or American-born issue of immigrants who have grown up in the cultural and linguistic environment of the Orient. Their disability has not been caused, created or exploited by any intentional policies of the respondents.[10]

Therefore, it is submitted that the petitioners have failed to establish that the state has drawn a classification based on the suspect criterion of alienage or national origin and, therefore, the District Court

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[8]Lowell High School is the public high school system's academic and most prestigious high school, drawing its student body from all over the City and choosing its applicants from among the students with the highest grades in junior high in the necessary prerequisite courses. Lowell has approximately 3,000 students. (See Respondents' Appendix A, pp. 5-6.)

[9]Part V, Section 12, of their Complaint—Appendix page 12. See also Part V, Section 15, Appendix 13, and Part II, Section 17, Appendix 13.

[10]It may be argued that the Respondents' failure to act "perpetuated" or "exacerbated" the petitioners' disability. However, the constitutionally recognizable consequences of a failure to act must be premised on a duty to act. That duty is the central issue in this case.

properly imposed the standard of reasonableness in reviewing the scheme of public instruction placed in issue in the instant case.

In the very recent case of *Jefferson v. Hackney*, ... U.S. ....., 92 S.Ct. 1724 (1972) the Court was called upon to review a welfare scheme in Texas which gave AFDC recipients a lower percentage of their standard need than other recipients. The plaintiffs claimed that the proportion of AFDC recipients who were black or Mexican American was higher than the proportion of other classes of recipients who fall into those minority groups. After referring to its deference to legislative and administrative discretion the Court said, at page 1732,

> "The standard of judicial review is not altered because of appellants' unproven allegations of racial discrimination."

The Court then reviewed the relevant statistics and cautioned:

> ". . . The acceptance of the appellants' constitutional theory [racial imbalance is 'constitutionally suspect'] would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment." (Footnotes deleted.)

The same analysis can be applied in the instant case. The mere fact that certain identifiable groups

are disadvantaged does not render a scheme of public instruction admittedly directed at the advancement of substantial state interests "suspect" and therefore subject to rigid judicial scrutiny. See *James v. Valtierra,* 402 U.S. 137 (1971), in which the Court reviewed an equal protection challenge to a California referendum requirement because it imposed a mandatory referendum to obtain approval for low cost housing while referenda relating to other legislation were not imposed. Said the Court at page 142:

> "But of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people." 402 U.S., at 142, 91 S.Ct. at 1334.

Thus, the Court is simply not about to impose the compelling interest standard on a showing of "disadvantages [to] a particular group." Something more is required—that additional element is the invidious purpose, the discriminatory intent, which is not tolerated. No such intent was alleged or proved in the instant case, and therefore it is submitted that the proper judicial standard for the review of the educational policies and procedures is the "reasonable-

ness test." The District Court properly applied that standard in the instant case.

D. The Legislative Decision To Conduct Public Schools In English Is Reasonably Related To The Objective Of Providing Free Public Education.

The petitioners are left with the requirement that they must establish that the system of public education is arbitrary and unreasonable, overcoming the presumption of validity which normally obtains when a Court reviews a scheme of state legislation.[11] *McGowan v. Maryland,* 366 U.S. 420 (1961); *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955). Therefore, it is submitted that the scheme of public instruction set forth in the Education Code and the requirement of Section 71 thereof that English be the language of instruction and that mastery of English be a mandatory requirement of public education should be viewed in terms of its reasonableness. In *Meyer v. Nebraska,* 252 U.S. 396, 398 (1922), this Court stated:

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[11]The petitioners refer to the Court's refusal in *Rodriguez, supra,* to involve itself in the complex issues of the relative merits of complicated tax programs and suggest that, "No such complex educational problems confront this court in the instant case." PB, pp. 41-42, footnote 88. The respondents refer to the exhibits (Appendix, pages 60-111.) These documents substantiate the proposition that the administration of bilingual and ESL programs is a new, highly complex and very costly field of public educational endeavor demanding a substantial commitment of public resources and requiring a high level of expertise in the preparation of course materials, the education of teachers and the actual administration of the program. The implication is that when the compelling interest standard is imposed, the Court must involve itself in evaluating the legislation in terms of whether it is the best means [least restrictive of fundamental rights] to serve the compelling state interest. In other words, the compelling interest standard does not tolerate imperfection. That could be a difficult task in the instant case.

> "The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes within the police power of the state."

Though *Meyer* dealt with a different issue, the court's dictum recognizes that it is reasonable to establish a system of public education and conduct it in English, the official language and dominant dialect of our social order. The Ninth Circuit resolved this question directly and succinctly:

> "In our case . . . the state's use of English as the language of instruction in its schools is intimately and properly related to the educational and socializing purposes for which public schools were established. This is an English-speaking nation. Knowledge of English is required to become a naturalized United States citizen, 8 U.S.C. §1423(1); likewise, California requires knowledge of the language for jury service, Cal. Code Civ. P. §198(2), (3). Similarly, an appreciation of English is essential to an understanding of legislative and judicial proceedings, and of the laws of the state. Cal. Const. Art. IV §24; Cal. Code Civ. P. §185, and of the nation. Use of English in the schools has this firm foundation. . . ."

The petitioners contend that it is unreasonable to provide public education in English to them since they cannot speak English. Since English is the majority language in this country, the decision to provide public education in a language which is likely to reach the largest number of people is hardly

rendered unreasonable by the fact that some citizens cannot benefit by it.

It is suggested, also, that it is arbitrary to establish a system of compulsory education in English and then require the attendance of students who cannot speak English. There are several answers to this argument: (1) The socializing experience of school which transcends the limitations of the medium of verbal communication justifies compulsory public education; (2) one of the best ways to liberate non-English speaking children from their cultural isolation is to place them with children who speak only English. This is admittedly not so desirable a means as ESL or bilingual instruction; however, it is an undisputed anthropological fact that a language is initially learned by imitation of speech patterns heard from others. The contact with fellow English speaking students is likely to stimulate the native proclivity for verbal imitation; (3) It is, furthermore, a well recognized principle of Constitutional law that state action which enforces a classification scheme is not judged unconstitutional merely because it fails to achieve a certain degree of mathematical nicety. *Norvel v. Illinois,* 373 U.S. 420, 423-424 (1963). *Morey v. Doud,* 354 U.S. 457, 463 (1952.)

Thus, the Court must determine whether the decision to provide public education and to conduct the schools in English was "without any reasonable basis and therefore purely arbitrary," while recognizing that "it is not enough that the measure in question results in some inequality or that it is not drawn 'with

mathematical nicety.'" *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 65 (1910). It must be concluded that the distinctions drawn in the instant case "have some basis in practical experience." *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966). And it may not be contended that the system operates "on the basis of criteria wholly unrelated to the objective of the statute." *Reed v. Reed*, 404 U.S. 71, 76 (1971). Nor may it be contended that the objective of maintaining schools in the English language is beyond the state's power to achieve. *NAACP v. Alabama*, 377 U.S. 288 (1964). Finally, it is only "arbitrary" or "invidious" discrimination which the courts will consider on constitutional grounds, after an examination of the circumstances of each case, with particular attention paid to the legal context, the nature of the individual interests allowed, and the nature of the state interest served. *Kraemer v. Union Free School Dist.*, 395 U.S. 621, 626 (1967). *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). This test is not confined to cases reviewing commercial and safety regulations. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). The reasonable relationship test applied to administration of public welfare assistance, even though this "involves the most basic economic needs of impoverished human beings." *Rinaldi v. Yeager*, 384 U.S. 305, See also *San Antonio Independent School District v. Rodriguez, supra.*

Lying behind these cases is the court's conception of the Fourteenth Amendment, its purport and intent, its scope and potency. Many cases reaffirm the principle that the Fourteenth Amendment was not enacted

with the intention of destroying the federal system. Nor do the courts view the Fourteenth Amendment as a tool which enables the courts under the auspices of the federal constitution to control the administration of government by the states. In *Younger v. Harris*, 401 U.S. 37, 44, 27 L.Ed.2d 669, 675 (1971) Mr. Justice Black said at pages 675-676:

> "The entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

See also *Oregon v. Mitchell,* 400 U.S. 112, 124-128, 27 L.Ed.2d 272, 287 (1971). At page 128, Mr. Justice Black stated:

> ". . . The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit

Congress to prohibit every discrimination between groups of people. . . ."

It is submitted, then, that when the court views the instant case in terms of the above-delineated standard of review it can only conclude that the scheme of public instruction conducted in English is a reasonable means of reaching a legitimate state objective.[12]

E. There Is No Basis For This Court's Imposing A Duty On The Respondents To Undertake Affirmative Action In The Instant Case.

The question of importance is when a state shall be deemed to have violated the "no state shall" proscription of the Fourteenth Amendment, thereby justifying judicial intervention leading to the imposition of a duty on the state to take affirmative steps to remedy an inequity.[13]

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[12]See California State Constitution Article IV, Section 1, which provides in part that "a general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people. . . ."

[13]It can be argued that the imposition of duty to undertake affirmative action is premised on the establishment of a "suspect classification" or "fundamental right." In these instances, the Court does not defer to legislative discretion but, rather, it examines the classification, substituting its own judgment for that of the legislators or administrators and finally, in appropriate cases compelling affirmative action to secure the fundamental rights. There is, therefore, a definite and complementary relationship between a decision to impose a duty to undertake affirmative action and a determination that a "suspect classification" has been made, thereby invoking the compelling interest standard. Thus the discussion in the section relating to the inappropriateness of this case for the imposition of the compelling interest standard is also apposite to the present discussion relating to a duty to undertake affirmative action.

It is important to emphasize that the disability of the plaintiffs cannot be attributed to any exclusionary state policies of cultural isolation or discrimination. The plaintiffs cannot speak and understand English because their cultural extraction is Chinese. See Appendix, pages 100-101, where it was estimated that of the 23,231 persons who would immigrate to the United States from China in 1968-1969, 4,788 would settle in San Francisco. Additionally, it was noted that between 1956 and 1960, more than one-third of the 22,421 Chinese immigrants to the United States settled in Chinatown and the North Beach area.[14] It is clear that the critical element in the problem is the immigration of many Chinese into the United States.

Therefore, the "disability" not having been state imposed or state perpetuated, the question really is whether the state may be bound, under the Fourteenth Amendment, to take affirmative action to remedy defects or compensate for disabilities which the state cannot be deemed to have caused.

The plaintiffs refer to *Bullock v. Carter*, 405 U.S. 134 (1972); *Mayer v. Chicago*, 404 U.S. 189 (1971); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Douglas v. California*, 372 U.S. 353; and *Griffin v. Illinois*, 351 U.S. 12, to support their contention that the state may be bound to take affirmative, curative action to remedy disabilities not imposed by the state.

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[14]San Francisco contains the largest Chinese population in the world outside the Orient. See AC Brief of the Chinese Consolidated Benevolent Association, et al., p. 7.

These cases are inapposite. In *Bullock v. Carter, supra*, there was clearly state action in the imposition of a filing fee requirement which substantially impaired the "fundamental" rights of less affluent electors to vote for the candidate of their choice. This case followed the line of authority which started with *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), holding that a citizen's affluence bore no reasonable relationship to his capacity to exercise his fundamental right to vote. In the instant case the District's policies do not weigh heavily on the exercise of any fundamental rights. Whereas affluence was deemed irrelevant to intelligent exercise of the franchise in *Harper*, the administration of the institutions of public education in the dominant dialect and official language is reasonably related to the advancement of many compelling state interests.

In *Williams v. Oklahoma City, supra*; *Mayer v. Chicago, supra*; *Douglas v. California, supra*; and *Griffin v. Illinois, supra*, the state action was clearly different from the instant case. In this case the Court is called upon to invalidate the constitutionality of a scheme of universal public instruction because it fails to accommodate the special needs of a certain segment of the students. In *Douglas, Griffin*, and their progeny, the Court was motivated by the necessity of securing for criminal defendants their due process rights to a just trial and fair procedures, regardless of their affluence. See also *Gideon v. Wainright*, 372 U.S. 335 (1962). Additionally, once again the Court in those cases concluded that a man's wealth bore no reasonable relationship to his guilt or innocence.

It should be noted, further, that in the case of the person charged with a crime, *the state has set him apart* from all other citizens and is proceeding to obtain extraordinary sanctions against him, in the form of either a fine or a deprivation of his liberty. This extraordinary state action is hardly analogous to the instant case where the state institutes compulsory education for all its students. Thus, in the instant case the plaintiffs are not challenging state action which picks them out and imposes some onerous burden but, rather, they are challenging the state for its failure to set them apart and give them special treatment because of their unique problems.

The appellants suggest that there has been discrimination against members of the plaintiffs' minority group. The respondents submit that such a contention is irrelevant to any issue on this appeal, first, because there was no evidence submitted to the Court of any invidous, discriminatory purpose, and second, because the record is well documented that the language difficulties of the plaintiffs can be attributed directly to their status as immigrants or issue of immigrants from China entering the respondent's School District, bringing with them the language and customs of the Oriental, Chinese culture. Therefore the petitioners' problems are not attributable to actions of the District but, rather, arise from cultural factors over which the District has no control.[15]

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[15]One of the persevering Constitutional questions of our time is whether, and to what extent, the state may be bound to equalize native or accidental differences or advantages between citizens. That is the issue in this case.

The inquiry of this Court inevitably turns to *Brown v. Board of Education,* (*supra*). In that case, the Court invalidated a classification scheme based *solely* on race and intended to segregate white from black students. The petitioners contend that the decision of the Court below erroneously interpreted *Brown.* The Court below reasoned that *Brown* involved "legally constituted and enforced dual school systems." Appendix page 120. Furthermore, said the Court, "*Brown* concerned affirmative state action discriminatory against persons because of their race." Appendix page 120. The Court, in essence, rested its conclusion on the critical language of the Fourteenth Amendment that "[N]o *state* shall . . . *deny* . . . to any person . . . the equal protection of the laws." Appendix 120. (Emphasis the Court's.) Thus, the Court of Appeal preserved the distinction between de facto and de jure segregation, and concluded that before a state may be bound to take affirmative action under the Fourteenth Amendment to relieve some disability, the state must have been implicated in the creation or perpetuation of the disability.

In the very recent case of *Keyes v. School District No. 1,* 93 S.Ct. 2686 (1973), 41 U.S.L.W. 5002, June 21, 1973, the Court reaffimed this distinction by refusing to accept the contention that mere racial imbalance in the composition of various schools in a district is enough to establish a constitutional violation.[16]

[16]It is to be noted that Mr. Justice Brennan stated, at page 2692, "Petitioners apparently concede for the purposes of this case that in the case of a school system like Denver's, where no statutory dual system has ever existed, plaintiffs must prove not only that

Rather, the petitioners must show some discriminatory purpose or invidious intent before the state can be held accountable for the racial imbalance. *Keyes, supra,* at 2693. See also *Sweatt v. Painter, supra, Korematsu v. United States,* 324 U.S. 885 (1944); *Donovan v. Board of Education,* 336 F.2d 988, 998, cert. den. 380 U.S. 914 (1964). The critical element, then, is the existence of some state imposed segregation or discrimination on account of race. In the instant case the petitioners are complaining because there has been no segregation and, in fact, that is just what they seek. They want the District to set them aside on the basis of their language disability and provide for them special educational services. If the petitioners were to prevail in this case, then every identifiable group in our society with apparent, recognized disabilities could call for special remedial state action on the theory that the state's failure to act when confronted with a serious problem constitutes a violation of the constitutional rights of the aggrieved citizen.

In *Rodriguez, supra,* this Court specifically held that there is no right to an education set forth either explicitly or implicitly in the Constitution. Therefore, there is no basis in the United States Constitu-

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segregated schooling exists but also that it was brought about or maintained by intentional state action." However, Mr. Justice Powell's dissent, urging an abolition of the de jure-de facto distinction, clearly establishes that this distinction weighed heavily in the Court's ruling. Needless to say, had the Court considered mere racial imbalance to constitute a Fourteenth Amendment violation, then the discussion in the majority opinion of the perils in attempting to isolate the discriminatory intent to a certain segment of the system would have been unnecessary.

tion for a court to impose any affirmative duty on the respondents to provide the petitioners with special instruction to remedy their educational handicaps.

This is the gist of *Brown, supra,* and *Keyes, supra.* Where the state has not acted to discriminate against a class of citizens because of their race, the state does not have an affimative duty to eliminate a condition of racial imbalance.

The disability of the petitioners in this case does not find its roots in any heritage of deprivation. Petitioners or their ancestors voluntarily immigrated to this country, and their linguistic difficulties arise from the cultural differences between their present and past environments; and, in fact, as demonstrated earlier, the elite high school of the public school system is nearly 30% Chinese. Thus the avenues of opportunity are open to Chinese residents along with all others in their pursuit of excellence.

The petitioners' case confuses two fundamental terms: "need" and "right." What they have incontrovertibly demonstrated is a *need* for special assistance; however, a right does not find its Constitutional genesis in a *need.* The correlative *duty* for which enforcement is sought must arise from some *right.* This distinction is important in the operation of our political system. A *need* does provide a basis for a petition to the legislative and/or administrative branches of government. A legislative or executive decision might result in the creation of a right. Once the petitioners have that right, they may petition the

Court for the enforcement of the duty correlative to that right. It is the legislature's function to entertain petitions premised on social needs, to set priorities, and finally, to exercise its discretion in determining which needs most merit relief in the form of laws creating the rights necessary to satisfy those needs.

Section 71 of the Education Code, as originally enacted in 1959, reads, "All schools shall be taught in the English language." In 1967 and 1968 that section was amended, and in its present form reads,

> English shall be the basic language of instruction in all schools.
>
> The governing board of any school district and any private school may determine when and under what circumstances instruction may be given bilingually.
>
> It is the policy of the state to insure the mastery of English by all pupils in the schools; provided that *bilingual instruction may be offered* in those situations when such instruction is educationally advantageous to the pupils. Bilingual instruction is *authorized* to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language.
>
> Pupils who are proficient in English and who, by successful completion of advanced courses in a foreign language or by other means, have become fluent in that language may be instructed in classes conducted in that foreign language. (Emphasis added.)

A 1968 amendment added the final paragraph and does not concern us here; however, the 1967 amend-

ment, as originally submitted, contained the same language as the present section (exclusive of the final paragraph), except that the word "encouraged" in the last sentence of the third paragraph was changed to the present word "authorized." See *Journal of the Senate of California*, 1967, vol. 1, p. 539.

It is therefore evident that the legislature responded to petitions based on the needs of some citizens by *authorizing* local school boards to institute bilingual instruction programs. However, the legislature did not compel local districts to undertake such programs, nor did the statute, as finally passed, even encourage the adoption of bilingual instruction. The legislature merely *authorized* such procedures. This analysis is important in that it focuses this Court's attention on the underlying issues in this case. With the exception of fundamental rights specifically, or by implication, set forth in the Constitution, the great source of enforceable rights and correlative duties, under the doctrine of separation of powers, is the legislative enactments of elected bodies. It is the legislature's province to determine how best to fulfill the relevant social and economic objectives within the limits of the resources available.

When the legislature seeks to solve social problems, it acts as an agent of the people vested by the electoral process with the authority to set priorities, allocate public resources and levy a tax on the citizenry to defray the cost of public services. If the problems are incompetently solved or if the priorities set do not reflect the desires of the people, then the electoral

process (including recall) provides the people with an opportunity to air their grievances and to choose leaders who will make a more socially desirable allocation of the finite public resources to resolve the infinite numbers of social problems. See *Dandridge v. Williams,* 397 U.S. 471, 485-486.

Once the elected representatives or the administrators to whom they delegate responsibilities set the priorities and enact into law or regulations the desires of the public, thereby creating rights and duties, then the judicial system can be petitioned to arbitrate between various members of the community determining the extent of rights and duties and providing appropriate enforcement.

However, it is not the function of the judiciary to set priorities and, in effect, create rights. The judiciary is primarily a remedial body which provides the relief necessary to enforce the rights. It is a dangerous and, indeed, totalitarian, concept that the judiciary should assume the role of setting priorities, allocating resources, and creating legally recognizeable rights and duties. Such a procedure, in essence, signifies that the judiciary has concluded that the common man cannot govern himself and is incapable of selecting leadership which can make the best use of public resources, the implication being that the judiciary knows best how to govern.[17]

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[17]In *Rodriguez, supra,* at page 1295, Mr. Justice Powell adopted the response of Mr. Justice Stewart in *Shapiro v. Thompson,* 394 U.S. 618 (1969), to the contention that the Court had become a super legislature, ". . . But Mr. Justice Stewart's response in *Shapiro* to Mr. Justice Harlan's concern correctly articulates the

For these reasons, the defendants submit that it is not only an unprecedented but also a dangerous constitutional doctrine to contend that where there is an important social need, the courts, under the fiat of the Fourteenth Amendment, can create a duty to fill that need and enforce the duty. The logical legerdemain of the appellants' cause of action when revealed justifies the conclusion of the Ninth Circuit,

> ". . . As long as there is no discrimination by race or national origin, . . . the states should be free to set their educational policies, including special programs to meet special needs, with limited judicial intervention to decide among competing demands upon the resources at their commands. . . ."
>
> Appendix page 129.

F. The Fourteenth Amendment Does Not Require The State To Equalize Differences Between Citizens.

The converse of the question regarding whether the state must take affirmative action where it has not imposed or contributed to the disability for which relief is sought is the question of whether the Fourteenth Amendment requires the state to equalize differences between citizens. Said Mr. Justice Powell in *Rodriguez at* 93 S.Ct. 1291:

> ". . . at least where wealth is involved the Equal Protection Clause does not require absolute equal-

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limits of the fundamental rights rationale employed in the court's equal protection decisions: 'The court today does *not* "pick out particular human activities, characterize them as fundamental and give them added protection. . . ." To the contrary, the court simply recognizes as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.'" 394 U.S. 642, 89 S.Ct. at 1335 (Emphasis from original.)

> ity or precisely equal advantages. Nor indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense."

Mr. Justice Powell further emphasized in *Rodriguez* that *Douglas, supra, Griffin, supra,* and *Mayer, supra,* do not stand for the proposition that the Fourteenth Amendment requires absolute equality.

The petitioners read *Rodriguez* as compelling the state to provide an opportunity to acquire the basic minimal educational skills. The gist of the *Rodriguez* opinion was the *opportunity.* The fact that the plaintiffs may not be able because of disabilities unrelated to any state action, to take advantage of those opportunities on an equal basis with English speaking children does not alter the fact that the opportunity is provided. Say the petitioners:

> "The exclusion of non-English-speaking Chinese youngsters from any educational opportunities is admittedly not caused by the School District erecting physical barriers at the school house door. These children are permitted, indeed required, to sit—and languish—in regular classrooms for six hours a day."
>
> Petitioners' Brief, page 14.

This is the gist of the case and the basis for Judge Burke's ruling:

> "These [plaintiffs]—by receiving the same education made available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District—

> are legally receiving all their rights to an education and to equal educational opportunities. Their special needs, however acute, do not accord them special rights above those granted other students."
>
> Appendix pages 114, 115.

Whatever may be said about *Rodriguez* and its conclusion regarding the absence of a right to an education, it is clear that when the Court was talking about an opportunity to an education in *Rodriguez*, it was not referring to an oportunity which is tailored to fit the individual needs and personal problems of each student. *Rodriguez* was talking about an educational opportunity in the general sense. The guaranty of equal protection is not a guaranty of equality of operation or application of state legislation on all citizens of a state. *Stebbins v. Riley*, 268 U.S. 137. Thus, the language in *Rodriguez* relating to educational opportunity is exactly apposite. Provided the state undertakes a reasonably conceived project to provide public educational opportunities to its citizens, the courts are not empowered under the Fourteenth Amendment to invalidate the educational system because some of the school age residents, due to physical, emotional, or cultural disabilities are unable to take adavantage of these opportunities.[18] Should the petitioners prevail in this case, then under the Fourteenth Amendment the paraplegic may

[18]It is to be noted that substantial legislative relief has been provided for physically handicapped children, Calif. Education Code §6801 et seq., for the mentally retarded children, §6201 et seq., for deaf children, §12801 et seq. and for "educationally handicapped" children. See also the following provisions of the Education Code §5770 et seq., disadvantaged children, §6450 et seq., non-English speaking children, §6870, exceptional children.

compel the state to transport him to the school; the deaf person may *compel* the state to give him a hearing aid; the children of the Samoan, Czechoslovakian, German, Armenian, Portuguese, Vietnamese, Italian, Indian, African, and Arabian, immigrants may *compel* the state to provide them with special assistance to learn English.

The implications of the petitioners' contention are even more pervasive. A municipality like San Francisco decides to provide public transportation (a privilege [but not a right of the population] of such great importance that general paralysis would result if the Municipal Railway were taken out of service). The paraplegic contends that physical mobility is absolutely essential to his well being and that without it he cannot earn a living, obtain an education, support a family, etc. He contends that the city has acted arbitrarily in setting him and all paraplegics in a suspect classification by providing public transportation which is absolutely useless to him. Needless to say, the implications of such a theoretical approach are without limitation. The petitioners' hypothetical example relating to the hospital giving the patient the wrong medicine is inapposite. More appropriate would be a public health facility which does not provide therapy or rehabilitation for mentally and emotionally disturbed. The decision to provide some health services is not rendered invalid simply because there are some citizens who still have not obtained the medical help they need.

Recently the California Supreme Court was called upon to determine whether the state must provide non-English speaking recipients of welfare (those

literate in Spanish) with notice of termination or reduction of welfare payments in Spanish. The Court concluded that the sole issue was whether the Constitution requires that the notices be in Spanish. *Guerrero v. Carleson,* ..... C.3d ..... L.A. 30079, July 30, 1973. (Opinion Attached, Appendix B.) The Court stated, at pages 6-7, its opinion

> "The United States is an English speaking country. Despite California's early Spanish culture, the language of our state government has long been that of the waves of American settlers who migrated here when California joined the Union . . . Justice Holmes declared a half-century ago 'It is desirable that all citizens of the United States should speak a common tongue.' *Meyer v. Nebraska* (1923) 262 U.S. 390, 412 (dissenting opinion). And this Court recently recognized that 'The state interest in maintaining a single language system is substantial . . .' *Castro v. State of California* (1970) 2 Cal.3d 223, 242."

The Court rejected the argument that equal protection of the laws was denied to the non-English speaking welfare recipients, when notices were sent to them in English only.

In *Carmona v. Sheffield* (N.D. Cal 1971), 325 F. Supp. 1341, aff'd per curiam, ... F. 2d ..... The Court dismissed an action by Spanish speaking citizens who sought to compel the state to administer its unemployment insurance program in Spanish. Said the Court, at page 1342:

> "In essence, plaintiffs' contention would require the State of California and, presumably, all other States and the Federal Government to

provide forms and to conduct its affairs and proceedings in whatever language is spoken and understood. The breadth and scope of such contention is so staggering as virtually to constitute its own refutation. If adopted in as cosmopolitan a society as ours, enriched as it has been by the immigration of persons from many lands with their distinctive linguistic and cultural heritages, it would virtually cause the processes of government to grind to a halt. The conduct of official business, including the proceedings and enactments of Congress, the courts and administrative agencies, would become all but impossible . . .

* * *

"The extent to which special consideration should be given to persons who have difficulty with the English language is a matter of public policy for consideration by the appropriate legislative bodies and not by the courts. . . ."

(Emphasis added.)

Intractable economic, social, and even philosophic problems presented by public welfare assistance programs were recognized not to be the business of the Supreme Court. *Dandridge v. Williams, supra.* This Court said, in *Dandridge,* at page 485:

"In the area of economics and social welfare, a state does not violate the Equal Protection clause merely because the classifications made by its laws are imperfect. If this classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31

> S.Ct. 337, 340. The problems of government are practical ones and may justify if they do not require, rough accommodations, illogical, it may be be true, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443."

In *Jefferson v. Hackney, supra,* this Court ruled that,

> "So long as its judgments are rational and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straight jacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them."

In the instant case, education is an important aspect of the state's scheme of laws to provide for the general welfare of the people. Education poses practical problems of immense magnitude. It could be said that the decision to provide free public education, conducted in English, is a "rough accommodation" of the demands of the society for education to the reality that English is the official language. Finally, the Fourteenth Amendment does not vest in the federal courts the power to impose on the San Francisco Unified School District a particular court's notion as to whether it is a wise, social policy and expenditure of public resources (in light of all the demands made on the District) to provide special language instruction to non-English speaking students. *Dandridge v. Williams, supra,* at pp. 485-486. The Constitution simply "does not provide judicial remedies for every social and economic ill." *Lindsey v. Normet*, 92 S.Ct. 862,

874. The function of the Fourteenth Amendment is negative and not affirmative and it carries no mandate for particular measures of reform. *Ownbey v. Morgan,* 256 U.S. 94. Absent a constitutional mandate the assurance of adequate educational facilities and the determination of what should be provided are not judicial functions. These are matters for the Board of Education and the state legislature to resolve. The respondents do not denigrate the importance of education, nor do they deny the existence of the petitioners' need; however, the respondents submit that the petitioners have directed their plea at the wrong public agency. This whole question involves the exercise of legislative and administrative discretion and does not fall within the pale of judicial fiat under the Fourteenth Amendment. Therefore a state may undertake to provide some social services without satisfying all needs or curing all demands. The Equal Protection Clause does not require absolute equality. *Breedlove v. Suttles,* 302 U.S. 277.

G. The Respondents Have Undertaken Substantial And Productive Steps To Establish Programs To Deal With Problems Similar To Those Of The Petitioners.

In the area of special bilingual instruction the respondents have been in the forefront of the educational field in seeking and obtaining funding for bilingual and ESL programs ("Teaching English as a Second Language"). At the time this action was instituted, San Francisco's School District had one of the only two federal grants to cities (New York being the other) for a pilot program in Chinese bilingual

studies. The original grant of $50,000 was increased to $198,000 for the 1970-71 fiscal year, enabling the District to expand and strengthen the program. Appendix pp. 60-93 contain documents submitted to the trial court. In the preliminary report on the Chinese bilingual program, the preface states, in pertinent part:

> "Since the inception of the program, requests have been made from educators and interested citizens around the globe for information regarding the new program." Appendix p. 80.

Therefore, affirmative state action to combat language deficiencies due to the divergent cultural extractions of some students was not a well-recognized everyday procedure. San Francisco was one of the first public school districts to undertake a solution to these very difficult and as yet unsolved educational problems. And this undertaking stimulated worldwide interest and attention. The District carried the responsibility of preparing course materials for bilingual instruction (Appendix pages 85-86), training teachers in techniques of language instruction (Appendix page 86), and providing demonstrations of ESL techniques. See also Appendix pages 89-91 regarding summer in-service workshop.

In addition to the above mentioned grants, the School District had invested $100,000.00 of its own funds in a Chinese Education Center. See affidavit of Isadore Pivnick, Appendix pages 36-37. See also the affidavit of Wellington Chew, Appendix pages 38-39, and affidavit of Edward Goldman, Appendix pages 53-54.

These statistics render specious the petitioners' contention that

> "Though the School District receives extensive federal financial assistance, it has taken no affirmative steps to rectify the discrimination suffered by non-English-speaking Chinese students." PB 10-11.

There is obviously the additional question which this Court would have to answer were the petitioners' theory adopted: How much help is enough help? This question is more than rhetorical. Does the Constitution merely compel ESL or must the District get up bilingual instruction? Must ESL instructors be able to speak Chinese? Under the compelling interest standard this Court would have to resolve these questions since that standard only tolerates state classification schemes which are narrowly drawn so as not to infringe on fundamental rights or tread into the no-man's land of the suspect classification. This is just what the petitioners sought in their complaint where they complained that, as to the second class of plaintiff who did receive some help, it (the help) was either not full time or administered by non-Chinese speaking ESL instructors or placement in the special classes was not based on tests or ascertainable standards. It is submitted that this Court is not the proper forum to review and resolve these questions.

Chinese students are not the only non-English speaking ethnic groups with substantial representation in the San Francisco Unified School District. The Report of Robert E. Jenkins contains a table (Appendix p. 63) which identified students who

needed special instruction in English in 1967. The survey counted more than 1800 Spanish-speaking children (there were more than 2400 Chinese-speaking students) and more than 700 children of "other languages." Thus, if the district may be compelled, by the Constitution, to provide the petitioners with special instruction, then similar assistance could be demanded on behalf of Spanish, Filipino, Japanese and other students who do not speak English.[19]

H. The First Amendment Rights Of The Petitioners Have Not Been Unconstitutionally Abridged.

The petitioners argue that they are denied educational opportunities and that they are "unable to communicate or understand the language of instruction, these students are foreclosed from any opportunity" to acquire the basic minimal skills "necessary to function in a classroom, let alone to enjoy the rights of speech and of full participation in the political process."[20] (P.B. 13, footnotes omitted.)

This is the same issue, again, except that in this case the petitioners contend that the state has an

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[19]Though not part of the record before the trial court, it should be noted that the district now administers bilingual programs in Chinese, Filipino, Spanish; and, starting in 1973-1974, there will be a Japanese program. In 1972-1973 the district spent nearly 2.5 million dollars on programs intended to provide special assistance (bilingual or ESL) to students who do not speak English. More than 50% of that sum came from local funds.

[20]This issue was never raised either at the level of the trial court or the Ninth Circuit. This argument raises legal theories which were not advanced to the trial court. The respondents contend that the issue is not properly before this Court. The analysis which follows does not concede the appropriateness of the petitioners' attempt to advance this argument at this stage of the proceedings.

affirmative duty to teach them English so that they can enjoy the full benefits of their First Amendment right to freedom of expression and association.[21] The answer to this contention is that the First Amendment, like the Fourteenth Amendment, is framed in negative terms.

> "Congress shall make no law . . . abridging freedom of speech or of the press or of the right of the people peaceably to assemble, and to petition the Government . . ."

In other words, the Constitution does not impose an affirmative duty on Congress to secure that each and every citizen be able to make maximum use of his First Amendment rights. That this is one of the objectives of universal public education is not to be denied. Whether the state has a duty to cultivate and maximize the verbal faculties of each and every citizen is the very question before this Court; and it is submitted that there is no basis in the First Amendment for establishing that either Congress or the states have any such affirmative duty. That was the gist of the complaint advanced in *Katzenbach v. Morgan, (supra)*. The complaint in this case is not that the state is affirmatively abridging the petitioners' right to expression. On the contrary, the contention is that in providing for general public education in

[21]Of course, respondents do not consider themselves bound by the First Amendment except insofar as that Amendment's safeguards have been "incorporated" into the Due Process Clause of the Fourteenth Amendment. Respondents do not question that the states under the Due Process Clause of the Fourteenth Amendment are bound by prohibitions similar to those set forth in the First Amendment. *Young v. California*, 308 U.S. 147 (1939), *De Jonge v. Oregon*, 299 U.S. 353 (1937).

English and in failing to provide special instructions to non-English speakers the state has not gone far enough. The state scheme of public instruction does not abridge freedom of expression and, in fact, in the context of the society as a whole, it undeniably expands the capacity of many citizens to exercise their Constitutional rights to freedom of expression. As for the petitioners, the state's scheme of public instruction, if viewed in its worst light, does nothing. It neither abridges nor expands their capacity for self expression. Since there was no active state abridgement of or interference with their First Amendment rights, it is submitted that there is no basis for this Court to conclude that the state has any such affirmative duty. See the discussion earlier on comparing *Katzenbach v. Morgan (supra)* with the instant case. It is apposite and need not be repeated.

In *Rodriguez, supra,* the Court also confronted, at 93 S.Ct. 1299, the appellees' contention that the system of financing public instruction which provided some students with less money for their education also impeded their opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process. After noting that the state did provide at least a minimal opportunity, the Court said:

> "Furthermore, the logical limitations on appellees' theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that ill-fed,

> ill-clothed, and ill-housed are among the most ineffective participants in the political process and that they derive the least enjoyment from the benefits of the First Amendment. If so, appellees' thesis would cast serious doubt on the authority of Dandridge v. Williams, supra, and Lindsey v. Normet, supra." (Citations omitted.)

Once again the petitioners have undeniably demonstrated an urgent need. However, the issue before this Court relates to the existence of a constitutional duty which does not, in fact, rest on a need.

I. Conclusion.

This case can be reduced to the narrow issue of whether on a showing of need arising from a disability neither created, imposed nor perpetuated by state action, the state has an affirmative duty to remedy that disability. In other words, does the Fourteenth Amendment vest in every aggrieved citizen the right to state remedial action merely because the citizen's personal problems prevent him from taking full advantage of an important benefit provided by the state? This question really calls for a reexamination of the social contract and an assessment of our democratic tradition. When the neanderthal man brought his family from his own abode to a common living space and society was erected around the delegation of functions for the purposes of efficiency, no one envisaged that the social order, erected for the mutual protection of all, was bound to cater to the personal difficulties of each.

The function of the state to provide for the general welfare has, needless to say, expanded since the age of pithecanthropus. However, it is an undisputed principle imbedded in our cultural and social heritage and written into the Social Contract that when the organized social order undertakes to solve general social problems, it selects certain members to examine the difficulties and decide how to act. In our democratic tradition those certain members constitute the legislature. The resolution of all social inequities is indeed a laudable and legitimate goal of the legislative branch of the government in the performance of its duty to provide for the general welfare but it certainly is not a constitutional mandate investing the Courts with a carte blanche for carrying out utopian reforms.

For these reasons it is submitted that the District Court and the Ninth Circuit properly ruled that there was no constitutional right to special educational treatment, that there was no suspect classification, that the scheme of public instruction to be conducted in the English language is reasonably related to permissible state purposes and finally, that there was no basis in the Constitution for a Court to order the respondents to provide the special instruction sought by the petitioners.

VI. RESPONDENTS' POLICIES ARE NOT IN VIOLATION OF THE CIVIL RIGHTS ACT

The petitioners contend that the respondents' failure to provide them with special instruction constitutes a violation of Section 601 of the Civil Rights

Act of 1964.[22] They also argue that the City failed to comply with the regulations of the Department of Health, Education and Welfare, Regulations 45 CFR 80. In addition, they conclude that the City has failed to comply with additional guidelines issued by HEW and with the affirmative action required by those guidelines. The Ninth Circuit ruled that

> "Our determination of the merits of the other claims of appellants will likewise dispose of the claims made under the Civil Rights Act." Appendix, pages 120-121.

It is submitted that the Court below properly resolved the petitioners' claims relating to violations of the Civil Rights Act. Additionally, the respondents contend that their policies do not violate the Civil Rights Act and are in compliance with the guidelines and regulations issued by HEW and promulgated in the Federal Register (Fed. Reg.) and the Code of Federal Regulations (CFR). Alternatively, the respondents argue that should their policies and administration be deemed inconsistent either with regulations, guidelines, or memoranda, etc. of the HEW, or with the Civil Rights Act, then it must be concluded that insofar as those regulations, guidelines, memoranda or statutes either classify as unlawful or require affirmative action relating to, activities or conditions which do not violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution, such regulations, guidelines, memoranda, or statutes, etc., are invalid.

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[22] 42 U.S.C. §2000d.

The petitioners have erected a logical house of cards and precariously perched their conclusions on the peak of its steeply pitched roof. Therefore, it is necessary to dismantle their argument in logical order.

The most recent document on which the petitioners rely appears in 35 Fed. Reg. 11595, and in petitioners' Appendix 1A. It is entitled,

> "Office of Civil Rights
> "IDENTIFICATION OF DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF NATIONAL ORIGIN."

After identifying its recipients, the memorandum provides:

> "Title VI of the Civil Rights Act of 1964, and the Departmental Regulations (45 CFR, Part 80) promulgated thereunder require that there be no *discrimination on the basis of race, color, or national origin . . .*" (Emphasis added.)

Presumably, then, the memorandum was issued pursuant to authority set forth in Title VI of the Civil Rights Act and 45 CFR 80.[23] The language in the Title of the Regulation refers to "discrimination" and "denial" of "services on the basis" of national origin. It is clear, thus, that the regulation relates to activities prohibited by the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Then the memorandum refers to:

> "common practices which have the effect of denying equality of educational opportunity to Span-

[23]These sources will be discussed later. At this point it should be noted that defendants will establish later on that Title VI of the Civil Rights Act was enacted by Congress pursuant to its powers set forth in Section 5 of the Fourteenth Amendment.

> ish-surnamed pupils. Similar practices which have the effect of discrimination on the basis of national origin exist in other locations with respect to disadvantaged pupils from *other national* origin-minority groups, for example, Chinese or Portuguese." The memorandum then identifies its purpose, ". . . to clarify HEW policy on issues concerning the responsibility of school districts to provide equal educational opportunity to national origin-minority groups deficient in English language skills."

Finally, the memorandum imposes an obligation to "take affirmative steps to rectify the language deficiency . . . where it [the deficiency] excludes national origin minority group children from effective participation in the educational program offered by the school district." (All the above references are to 35 Fed. Reg. 11595, July 18, 1970, Petitioners' Appendix 1a-3a.)

The question is whether the language of 35 Fed. Reg. 11595 can be held applicable to the respondent San Francisco Unified School District.[24] One possible interpretation of the memorandum would embrace all possible situations where a student's language deficiency without regard to its cause impedes his full performance and development in school. The respond-

[24]Parenthetically it is interesting to note that the petitioners, in their initial complaint, referred only to 33 Fed. Reg. 4850, which imposed an affirmative duty to eliminate discrimination based on race or national origin, and to correct the effects of past discrimination. The respondents are in complete agreement with this regulation. Since no past or present discrimination was alleged or proved, this regulation imposes no affirmative duty on the respondents.

ents submit that this is the improper interpretation for the following reasons:

(1) A reading of the whole memorandum (35 Fed. Reg. 11595) indicates that it was prepared following a Title VI compliance review. The implication was that the memorandum was drawn to deal with situations found to be in violation of Title VI.

(2) The language in the third paragraph of 35 Fed. Reg. 11595 which refers to "practices which have the effect of denying equal educational opportunity" must be read to refer to practices which do in fact constitute a violation of the Fourteenth Amendment rights of students to an equal educational opportunity.

(3) The title of the memorandum demonstrates that it was intended to aid in the *"identification* of *discrimination* and *denial of services on the basis of national origin."* The words "discrimination" and "denial on the basis of national origin" have almost become words of art and in the framework of civil rights, must be understood to refer to activities or policies which violate the Fourteenth Amendment.

(4) 45 CFR 80 and Title VI, of the Civil Rights Act, which provide the statutory and administrative basis for the memorandum only embrace within their prohibition activities which contravene the Fourteenth Amendment (discussed below).

(5) If the language of 35 Fed. Reg., 11595, must unavoidably be interpreted to extend beyond requiring the state to undertake affirmative steps where there

has been unlawful state action at some time, then it is submitted that the director of the Office for Civil Rights exceeded the authority vested in him by Congress in Title VI of the Civil Rights Act.

45 CFR 80 once again talks about "nondiscrimination" and, in Section 80.1, sets forth its purpose:

> "The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 hereafter referred to as the 'Act') to the end that no person in the United States shall; on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Health, Education, and Welfare."

Then, Section 80.3 more specifically defines the discrimination prohibited, providing in subsection (a):

> ". . . No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies."

As noted earlier, 35 Fed. Reg. 11595 was issued pursuant to the mandate set forth in Title VI of the Civil Rights Act and in 45 CFR 80. It is clear from a careful reading, 45 CFR 80, that its proscription embraces only activities which can be deemed to be in violation of the Equal Protection Clause of the Fourteenth Amendment.

Both 35 Fed. Reg. 11595 and 45 CFR 80 identify their purpose to be the effectuation of Title VI of the Civil Rights Act of 1964.[25] Title VI is promulgated in 42 U.S.C. 2000d and 2000d-1, which provide:

> 2000d: No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving federal financial assistance.
>
> 2000d-1: Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination

[25] An important conceptual distinction is to be noted. It is conceded that Congress could pass a statute requiring schools receiving federal financial assistance to provide bilingual or other special instruction to non-English speaking students. This would be well within the Congressional prerogative to provide for the general welfare; however, this is not what Congress did. Title VI of the Civil Rights Act was enacted to prohibit activities which constituted violations of the Fourteenth Amendment. Therefore, it is submitted that though Congress could require such affirmative action in all cases as a condition of the federal grant, this is not what Congress has done in the instant case and, therefore, the administrative officials in the executive branch have no power to exact conditions in excess of the Congressional grant.

of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Section 2000d therefore prohibits exclusion from participation or denial of benefits or discrimination on ground of race, color or national origin when under any program or activity receiving federal financial assistance. Section 2000d-1 allows federal departments to issue rules, regulations or orders of general ap-

plicability to effectuate the provisions of Section 2000d. Therein lies the source of authority for 45 CFR 80 and 35 Fed. Reg. 11595.

The legislative history of Title VI of the Civil Rights Act reveals an unequivocal intention to prohibit actions and policies which constitute violation of the Fourteenth Amendment. Regarding H.R. 7152,[26] the House Report summarized Title VI as requiring "nondiscrimination in federally assisted programs."[27] The House Report's general statement[28] regarding what the legislation is designed to combat notes that "a number of provisions of the Constitution of the United States clearly supply the means 'to secure the rights.' "[29]

Clearly the petitioners do not contend that the Thirteenth and the Fifteenth Amendments are being violated in the instant case. Title VI was enacted by Congress specifically to enforce the Fourteenth Amendment. The general statement contained in the House Report discussed above is replete with references to unlawful discrimination. In its specific analysis of Title VI the House Report[30] states in part: states in part:

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[26]The 1964 Civil Rights Act containing Title VI.

[27]*U. S. Congressional and Administrative News*, 1964, p. 2392.

[28]*Ibid.*, pp. 2393-2394.

[29]Section 2 of the Thirteenth Amendment (abolishing slavery), Section 5 of the Fourteenth Amendment (prohibiting state imposed denials of Due Process or Equal Protection, and Section 2 of the Fifteenth Amendment (prohibiting denial or abridgement of the right to vote on account of race, color or previous condition of servitude) all empower Congress to enforce the particular amendment with appropriate legislation.

[30]*U. S. Congressional and Administrative News*, 1964, pp. 2400-2401.

> "This title [Title VI] declares it to be the policy of the United States that discrimination on the ground of race, color or national origin shall not occur in connection with programs receiving Federal financial assistance and authorizes and directs the appropriate Federal departments and agencies to take action to carry out this policy."

The additional majority views of Honorable William M. McCullough, Honorable Jon V. Lindsay, Honorable William T. Cahill, Honorable Garner E. Shriver, Honorable Clark McGregor, Honorable Charles McMathias, and Honorable James E. Bromwell,[31] emphasize that the Civil Rights Act is not a panacea, but that the bill ". . . can and will commit our Nation to the elimination of many of the worst manifestations of racial prejudice. . . ."[32]

Referring to that portion of the legislation which ultimately became Section 2000d.[33] The above named commentators noted that

> "Testimony before this House Judiciary Subcommittee and data gathered by the Civil Rights Commission is available which demonstrates that in many regions of the country citizens are *denied equal benefits from Federal financial assistance programs because of their color.*" (Emphasis added.)

Said Judge Robinson before the House Judiciary Subcommittee regarding the language contained in 2000d,

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[31] *Ibid.*, pp. 2488-2510.
[32] *Ibid.*, p. 2418.
[33] Title VI, Section 601.

". . . By this recommendation the Commission will seek remedial, not penal or punitive action. What the Commission had in mind was that the expenditure of Federal funds be made in a manner which would benefit all citizens without distinction on account of race or color. What it had in mind were safeguards against the use of Federal funds in a way that encourages or permits discrimination. The report itself states that the Commission's goal is that all citizens in the United States be assured the full enjoyment of the rights guaranteed by the Constitution."[34]

It is therefore submitted that the Congressional intent in enacting Title VI of the Civil Rights Act of 1964 was to apply pressure on the states, through the federal government's power to grant financial aid, to eliminate state policies and activities which violate the prohibitions set forth in Section 1 of the Fourteenth Amendment.

Section 706 of Title 5 of the U.S.C.A. deals with the scope of review and provides in pertinent part that

". . . the reviewing court shall . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be . . .

* * * *

"(c) In excess of statutory jurisdiction, authority or limitations or short of statutory right; . . ."

It is submitted that Judge Burke ruled properly in concluding that the resolution of the alleged consti-

[34] *U. S. Congressional and Administrative News*, 1964, p. 2512.

tutional violation also disposed of the Title VI Civil Rights Act. However, if the Court had considered the school policies and actions to be in violation of the HEW regulations, then the judge would have been bound to hold those regulations invalid insofar as they purported to compel the City to take affirmative steps to remedy language disabilities for which the School District was deemed not to be constitutionally responsible.

Section 5 of the Fourteenth Amendment was not intended to invest Congress or the courts with the power to legislate upon subjects which are within the domain of the state legislatures or to impose on the states their view of what constitutes wise economic or social policy. *Dandridge v. Williams, supra; In re Rahrer,* 140 U.S. 554 (1891); *Younger v. Harris, supra,* and *Oregon v. Mitchell, supra.* These cases not only confirm the role of the judiciary in our system of separation of powers, but, also, they reaffirm the principle that our federal system is composed of separate states which the framers of the Fourteenth Amendment did not intend to homogenize into an amorphous monolith. And this court has held that it was not the intention of the drafters of the Civil Rights Act that all matters formerly within the exclusive cognizance of the states should become a matter of federal judicial responsibility. *Snowdon v. Hughes,* 321 U.S. 1 (1943). Furthermore, the content of the Civil Rights Act, Title VI, and its legislative history do not support the administrative interpretation and construction of §2000d which the petitioners contend was made by the HEW officials. *Griggs v. Duke*

Power Co., 401 U.S. 424. And administrative action in excess of statutory power must be set aside. Citizens' Committee for *Hudson Valley v. Volpe,* 425 F.2d 67, cert. den. 400 U.S. 949 (1970). It is submitted that the interpretation of the regulation advanced by the petitioners, if accepted, would result in administrative action in excess of the statutory power and, as such, must be set aside. The Civil Rights Act, Title 42, Section 2000d-1 simply has not granted authority to make such regulations. That section merely allows the departments to make regulations to enforce Section 2000d.

In the recent case of *Jefferson v. Hackney, supra,* this Court confronted a challenge to certain computation procedures which the State of Texas used in the federally assisted welfare programs. The appellants contended inter alia that the scheme violated the Fourteenth Amendment (discussed in the first part of this brief relating to the equal protection argument). Said the Court, in footnote 19:

> "Just as the state's actions here do not violate the Fourteenth Amendment, we conclude that they do not violate Title VI of the Civil Rights Act of 1964 §2000d. The Civil Rights Act prohibits discriminataion in federally financed programs. We have, however, upheld the findings of *nondiscriminatory purpose* in the percentage reductions used by Texas, and have concluded that the variation in percentages is rationally related to the purpose of the separate welfare programs. . . . Since the Texas procedure challenged here *is* related to the purposes of the welfare program, it is not proscribed by Title VI simply because of

variency in the racial composition of the different categorical programs." (Emphasis added.)

Accord, *Goodwin v. Wyman,* 330 F.Supp. 1038 (1971). Essentially the same showing is required to establish a violation of 42 U.S.C.A. §2000d as is needed to make out a violation of the Equal Protection Clause of the Fourteenth Amendment. Likewise it is submitted that since the general scheme of public education in English is reasonably related to the purposes of general public education; it is not proscribed by Title VI simply because some students with language difficulties do not perform to their full potential.

The outlines of this principle were set forth in two cases which when placed in juxtaposition, clearly reveal the critical element. In *Southern Alameda Spanish Speaking Organization v. City of Union City,* 314 F.Supp. 967 (1970), the court concluded that since there was no issue in the case relating to the existence of racial discriminataion as to any program or activity receiving federal assistance, then there can be no violation of the Civil Rights Act Section 601 which provides that no person shall, on grounds of race, color or national origin be excluded from participation in or be subjected to discrimination under a program or activity receiving federal financial assistance.

However, in *Gatreaux v. Chicago Housing Authority,* 265 F.Supp. 582 (1967), the Court held that if the dominant factor in the selection of public housing sites was racial concentration, then the decision violates the Constitution and also §2000d of Title 42.

See also *Bossier Parish School Board v. Lemon,* 370 F.2d 847, 852, Cert. denied 388 U.S. 911 (1967) which concluded:

> "But it [Section 601 of the Civil Rights Act] also states the law as laid down in hundreds of decisions, independent of statute."

And so the respondents submit that the Civil Rights Act of 1964, Section 601, does constitute a legislative promulgation of the prohibitions set forth in the first section of the Fourteenth Amendment and Section 602 (2000d-1 of Title 42) was intended to authorize and empower federal administrative enforcement of the prohibitions. For these reasons the respondents maintain that *Gatreaux, supra,* and *Southern Alameda County* were correct in their identification of the critical element of discriminatory intent or motivation in a cause of action alleging a violation of the Civil Rights Act of 1964, Section 601. And as in the constitutional analysis presented above, it is not enough that a plaintiff allege and prove that an identifiable minority is "affected" by state legislation in a more burdensome manner than other citizens. The mere incidental hardship which an identifiable insular minority suffers does not amount to a constitutional or federal statutory violation when it is evident and demonstrated that the legislation and procedures in question were enacted, adopted and enforced to serve other important state interests of admitted legitimacy.

Thus, the respondents summarize their arguments relating to the Civil Rights Act as follows; first, the language in all the HEW regulations, if properly

interpreted, cannot be held applicable to any policies of the respondents where no violations of the Fourteenth Amendment have been shown. Should that language be deemed applicable to respondents' policies, even though no constitutional violations have been shown, then the regulations are in excess of the delegation of authority set forth in Title VI of the Civil Rights Act. Furthermore, that Act was intended only to prohibit practices and policies which constituted violation of the Constitution and Congress, acting pursuant to the delegation of power set forth in the Thirteenth, Fourteenth and Fifteenth Amendments could not have proscribed activities or policies which did not violate those amendments. Finally, this Court has confirmed the principle that the violation of the Civil Rights Act is established where the requirements for establishing a violation of the relevant constitutional provisions have been satisfied. Therefore, it is submitted that both the Ninth Circuit and the trial Court properly ruled that the respondents had not violated the statutory rights of the petitioners as set forth in Title 42, Sections 2000d and 2000d-1.

VII. CONCLUSION

The petitioners would have this Court believe that the respondents have done nothing to solve the educational problems posed by students from a non-English speaking environment. The impression conveyed by the petitioners is that the respondents have totally ignored and refused to deal with a serious problem.

This is not the case. Unfortunately the petitioners have attempted to obfuscate the issue in this case by charging the respondents with callous intransigence. The record before the trial court and Judge Burke's finding repudiate this contention. Respondents are committed, within the limits of their resources and with regard to the other urgent demands made on those resources to provide bilingual or ESL instruction to those students who need special assistance. The respondents' concern in this case lies in the domain of the alleged existence of constitutional duty. Should this Court affirm the rulings of the lower Court the respondents will only continue the already prodigious and continuously growing undertaking of providing bilingual instruction not only in Chinese but also in Spanish, Filipino and Japanese. The respondents are committed to quality education for all their students and they submit that they are best able to determine how to provide that quality education and maximize the utility of the public resources available for expenditure in public education.

In *San Antonio Independent School District v. Rodriguez, supra,* the court said, at 1299:

> "The equal protection clause does not require 'absolute equality or precisely equal advantages in education and absent invidious discrimination, the fact that there are disparities in educational programs does not violate that clause where the system provides' each child with an opportunity to acquire the basic minimum skills necessary. . . ."

It is submitted that the respondents provide that opportunity. They are not bound to show that the opportunity provided to each student is pedagogically tailored to suit his particular educational problems but, rather, the mandate is broad and general. If a state chooses to provide education, it must present a scheme which is founded in reason and legitimately related to the general objective of public instruction. This, and more, the respondents have done and neither the Constitution nor the Civil Rights Act requires more.

Dated, San Francisco, California,
October 1, 1973.

Respectfully submitted,

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(Appendices Follow)

Appendix A

In the United States District Court
For the Northern District of California

Wendy Berkelman, et al.,
Plaintiffs,
vs.
San Francisco Unified School District, et al.,
Defendants.

Save Lowell Committee, et al.,
Intervenors.

[Filed Dec. 19, 1972]

MEMORANDUM OPINION AND ORDER OF SUMMARY JUDGMENT

1. This case is brought under 42 U.S.C. §1983 et seq. and challenges the policy of the Board of Education of the San Francisco Unified School District in maintaining Lowell High School, one of the District's Senior High Schools, as an academic high school. Plaintiffs' complaint alleges (1) that the operation of an academic high school, without reference to the racial mix in it or in other high schools in the District, is per se unlawful by reason of the fact that the quality and extent of the curriculum offered at that school is different from that available at other high schools in the District and is offensive to the remaining students within the system because its existence

causes severe intellectual and emotional harm; (2) that the standard of admission to that academic high school, past academic achievement, is unconstitutional because the even-handed application of it results in there being a racial and economic mix at the school different from the mix which exists in the District at large; (3) that the School District's policy of admitting approximately equal numbers of boys and girls to the school discriminates against girl applicants because the application of that policy results in the school's admitting male students with grade point averages .25 (on a 4-point scale) lower than the grade point averages of the female students it admits: and (4) plaintiffs believe that the District's allocation of educational resources has unfairly favored Lowell over the other institutions within the system.

The case is before the Court on Defendant's Motion to Dismiss or, in the alternative, Motion for Summary Judgment and Plaintiffs' Motion for Preliminary Injunction and Motion for Partial Summary Judgment as to their second, third and fourth causes of action.[1]

Intervenors have joined with defendants in moving to dismiss this suit and for summary judgment.

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[1]Plaintiffs have not moved for summary judgment with respect to their first and fifth causes of action. The first cause of action is based upon the proposition that the maintenance of Lowell as an academic high school is per se unconstitutional because the quality and extent of the curriculum at Lowell is different from that made available to the students in the District's comprehensive high schools. Plaintiffs' fifth cause of action is for declaratory relief. There are no material facts with respect to those two causes of action which are in dispute or which are not among the facts which are the subject of plaintiffs' motion for summary judgment with respect to their second, third and fourth causes of action.

Defendants' original motions were filed on January 17, 1972 and were set for hearing on February 18, 1972. The hearing was continued at plaintiffs' request to permit further discovery. There was a further hearing in April, during which plaintiffs requested that discovery remain open, and the Court granted that request. At that April hearing, plaintiffs moved to file an amended complaint; defendants stipulated to that motion being granted and plaintiffs did file an amended complaint, with defendants' motions renewed as to said amended complaint. A final hearing was held on July 7, 1972. On that date all parties were given the opportunity to present final argument and to present live testimony. Final argument was heard from all parties, but no party elected to present live testimony nor was any request made for additional time for discovery, or to file any further amended pleadings. All of the pending motions were, on that date, submitted.

There are no disputed issues of material facts. The cross-motions for summary judgment are based upon that premise. The Court is now in a position to render a final decision in this case.

2. *The Parties.*

Plaintiffs are students in the San Francisco Unified School District who are not qualified to attend Lowell High School under its admissions policy, or who are qualified to go there and have elected not to. Plaintiffs allege that they represent black and Spanish-speaking students, students of "low-economic

backgrounds", and female students. (Amended Complaint, pp. 3-5).

Defendants are the San Francisco Unified School District, the members of the San Francisco Board of Education, and the Superintendent of Schools.

Intervenors are (1) the Save Lowell Committee, an association of alumni and alumnae of Lowell High School, parents of past and prospective students there, and other San Francisco residents "interested in preserving and protecting Lowell High School as an academic institution" (Intervenors' Answer, p. 2); and (2) students who are or will be qualified to go to Lowell under its admissions policy and who have elected to go there. The intervening students include blacks, Spanish-speaking students and students of low economic backgrounds. (Intervenors' Answer, pp. 3-4).

The San Francisco Unified School District is a unified school district. It operates 11 senior high schools. (District's Answers to 1st Interrogatories, Ex. O; Plaintiffs' Memorandum in Support of Motion for Summary Judgment, Ex. 1).

The Seven Comprehensive Schools.

Seven of the 11 high schools are "comprehensive" high schools to which students are assigned "on the basis of their residence." (Amended Complaint, pp. 6-7; Dist's Ans. to 1st Interrogs., Ex. O).

All of the comprehensive high schools "offer a college preparatory program which meets the admission

requirements of the University of California." (Dist. Memo. I, p. 17).[2] All the comprehensive high schools send graduates to institutions of higher education. (Dist's. Ans. to 2nd Interrogs., Ex. B, Ex. E).

The Three Special Schools Other Than Lowell High School.

The School District operates three special high schools other than Lowell High School: Opportunity High School, whose function "is to serve students who are not succeeding in conventional high schools;" Samuel Gompers High School, which serves working students who wish to attend school part time and foreign born students "who do not communicate in English well enough to learn effectively in a regular District high school;" and John O'Connell vocational high school, which offers vocational and general educational curricula. (Dist's Ans. to 1st Interrogs., Ex. O; Amended Comp., p. 6). Plaintiffs do not challenge the District's right to operate those special schools.

Lowell High School.

Lowell High School "was established and is operated as the District's academic high school." (Amended Comp., p. 7; Dist's Ans. to 1st Interrogs., Ex. O). Lowell is non-districted," and is therefore open to all students in the District regardless of

[2]The facts set forth in that memorandum are sworn to in an affidavit of Barton Knowles, which was served and filed with the memorandum.

residence. (Dist's 1st Ans. to Interrogs., Exs. B-1, B-4 and O; Ptf. Memo. in Support, p. 10).[3]

Lowell offers a curriculum which includes advanced academic courses, some of which are not available at other high schools in the City. That, as plaintiffs put it, "of course is the nature and meaning of an exclusive academic high school." (Ptf. Memo in Support, p. 28; Amended Comp., p. 7).

4. *Lowell's Admissions Policy.*

Lowell admits students on the basis of their past academic achievement in junior high school. (Amended Comp., pp. 6-9; Dist's Ans. to 1st Interrogs., Exs. A and B). Lowell admits students "solely" on that basis (Ptf. Memo in Support, p. 11). Plaintiffs concede that the standard is neutral on its face, and do not contend that it has been administered unfairly.[4] (Ptf. Memo in Support, pp. 7, 11, 24, 32, 34, 36, 37). Plaintiffs complain that the result of the application of that admissions standard is that most of the "high academic achievers' and "bright and

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[3]Lowell was moved to the southwest corner of the City in 1961. (Amended Comp., p. 15). More than 40% of Lowell's students come from residences in the eastern half of the City. (Dist. Memo I, pp. 25-26). In addition, Lowell's student body has a substantial percentage of Chinese students. The two junior high schools closest to Chinatown, Francisco and Marina, send a large number of students to Lowell. (Dist's Ans. to 1st Interrogs., Ex. P-3; Dist's Ans. to 2nd Interrogs., Ex. F-1; Ptf. Memo. in Support, Ex. 1). Those two junior high schools appear to be further from Lowell High School than any other junior high schools in the City. (Dist's Ans. to 2nd Interrogs., Ex. F-1).

[4]Lowell's admissions standard and changes made in it between 1966 and 1971 are explained at Dist's Ans. to 1st Interrogs., Exs. A, B, B-3, C, C-1, I.

motivated students" in the District go to Lowell. (See Amended Comp., p. 20; Ptf. Memo in Support, p. 7).

5. *The Pilot Minority Program and the Policy of Admission of Equal Numbers of Girls and Boys.*

In 1970 the District instituted a "pilot minority group" program according to which all Spanish-speaking and black applicants to Lowell whose grade point averages were with .5 (on a 4 point scale) of the cut-off point for other applicants were admitted to Lowell. (Dist's Ans. to 1st Interrogs., Nos. 45(c), 55-57, and Ex. U). In 1971, the percentage of black and Spanish-speaking applicants thereby accepted out of those applying to Lowell was 70% and 85% respectively, higher than the percentages with respect to any other group of applicants. (Ptf. Memo in Support, p. 28).[5]

In 1970, the District also instituted a policy which calls for Lowell to admit approximately equal numbers of boys and girls. (Dist's Ans. to 1st Interrogs., Ex. O). As a consequence of the operation of that policy, the cut-off point for female applicants admitted to Lowell in 1970, 1971 and 1972, was .25 higher than for males. (Amended Comp., pp. 8-9).

The District's purpose in admitting black and Spanish-speaking students with grade points .5 less than the cut-off with respect to other applicants was "to improve the racial balance of the Lowell student

[5]Enrollment of blacks and Spanish-speaking people increased during the period 1966 to 1971. (Dist. Memo I, p. 27; See also Amended Comp. p. 6).

population." (Dist's Ans. to 1st Interrogs. No. 45(c), Ex. U). The District's purpose in admitting boys with grade points .25 less than girls was to achieve an approximately equal balance between boys and girls in the Lowell student population. (Dist's Ans. to 1st Interrogs. Ex. O; Dist's Ans. to Requests for Admissions. No. 3). Plaintiffs attack the second of those two policies, but not the first.

6. *The Racial Make-Up of Lowell High School.*

This is not a case of whites on the one hand and blacks or Spanish-speaking people on the other. Plaintiffs have set up the group "white and/or Asian" on the one hand, and blacks and Spanish-speaking persons on the other. (Amended Comp., p. 14; Memo in Support, p. 5).

Less than one-half of Lowell's student body is white (Ptf. Memo in Support, Ex. 1), and there is a substantial mix of races at Lowell. The percentages of various groups at Lowell as compared with the percentages of such groups in the District at large are these: Twenty-nine and eight-tenths percent of Lowell's students are Chinese; the District all-high school percentage is 17.9%. Three and eight-tenths percent of Lowell's students are Filipino; the District all-high school percentage is 4.5%. Three and two-tenths percent of Lowell's students are Japanese; the District all-high school percentage is 1.9%. Five and two-tenths percent of Lowell's students are Spanish-speaking; the District all-high school percentage is 13%. Seven and five-tenths percent of Lowell's stu-

dents are black; the District all-high school percentage is 25.9%. (Ptf. Memo in Support, Ex. 1, pp. 1-2).[6]

In 1970 the School District instituted its policy with respect to admitting approximately equal numbers of girls and boys at Lowell. From 1962 to 1965, when that policy was not in effect, the percentage of girls admitted to Lowell ranged from 49.9% to 53.7%, with the exception of the spring of 1964, when the percentage was 57.6%. From 1966 through 1969, when that policy was still not in effect, the percentage of girls admitted to Lowell High School increased: the percentages ranged from 49.7% to 60.8%, and the percentage was 56% or higher during 4 of the 8 semesters which occurred during those years. From 1970 to 1972, after the policy was put into effect, the percentage of girls admitted to Lowell ranged from 48% to 55%, approximately the percentage which obtained between 1962 to 1965. (Dist's Ans. to 2nd Interrogs., No. 7).

8. *Female v Male Achievements in Lower Grades.*

The School District has cited treatises to support the proposition that girls achieve better grades than boys in the first nine grades of school, while boys catch up during high school or later. (Dist's Ans. to 1st Interrogs., Nos. 61, 62). According to the School

[6]Plaintiffs describe Washington High School as a well-integrated" school. (Amended Comp., p. 7). Lowell has a higher percentage of Spanish-speaking students, one of the two racial groups with respect to which plaintiffs complain, than Washington does. (Ptf. Memo. in Support, Ex. 1).

District, that fact is "common knowledge among educators and those who have studied in this area. . ." (Supplemental Response No. 2 to Plaintiffs' Requests for Admissions). There is a body of literature, some of which is cited and relied upon by plaintiffs' affiants Amster and Tyler, which is in accord with that statement of the School District's. Quotations from the treatises cited by plaintiffs' affiants are set forth in Intervenors' Memorandum Re: Plaintiffs' Affiants' Treatises Re: Sex Differences.

Literature cited and written by plaintiffs' affiant Tyler also states that "generally, American educators have considered that the advantages of coeducation outweigh its disadvantages." (Quoted at Intervenors' Memorandum Re: Plaintiffs' Affiants' Treatises Re: Sex Differences, p. 5).

9. *The Issues in The Case, and The Conclusions With Respect To Them.*

There are four issues:

(1) *The first issue.*

Plaintiffs allege that the operation of an academic high school, without reference to the racial mix in it or in other high schools in the District, is per se unlawful by reason of the fact that the quality and extent of the curriculum offered at that school is different from that available at other high schools in the District,[7] and because its very existence may cause intellectual and emotional harm to excluded students.

[7]Plaintiffs seem to have abandoned that contention. (Ptf. Memo in Support, p. 28).

The issue is: is it within the District's discretion to operate an academic high school which offers a curriculum different from that offered in other high schools in that District.

Conclusion. It is constitutionally within the School District's discretion to do so, and the constitution does not prohibit it from doing so. *Swann v. Charlotte Mecklenburg Bd. of Educ.,* 402 U.S. 1 (1971); *King v. Saddleback Junior College Dist.,* 455 F.2d 932 (9th Cir. 1971); *Sando v. Alexandria City School Board,* 330 F.Supp. 773, 775 (E.D. Va. 1971); *Sims v. Board of Education of Independent Sch. Dist.,* No. 22, 329 F.Supp. 678, 690 (D.N. Mex. 1971); *Brown v. Educational Testing Service,* No. C-71-2029 (N.D. Calif. 1971, the Honorable Judge Zirpoli presiding).

(2) *The second issue.*

Plaintiffs allege that the standard of admission to Lowell, past academic achievement, is unconstitutional because the even-handed application of it results in there being a racial and economic mix at Lowell different from the mix which exists in the District at large. Memo in Support, pp. 24, 37). That standard of admission is neutral on its face, and there is no charge that the School District does not apply it fairly or that the School District intends to discriminate by its use. Plaintiffs' position is that "the absence of discrimination on the part of District school officials is immaterial," (Ptf. Memo in Support, p. 24), and that "the absence of allegations of

intentional or purposeful discrimination on the basis of race or wealth in plaintiffs' complaint is immaterial." (Ptf. Memo in Support, p. 37).

The issue is: is it within the School District's discretion to admit students to an academic high school on the basis of past academic achievement where the equal application of that standard results in the school's having a larger or offensive to excluded students? (Sic).

Conclusion. It is constitutionally within the School District's discretion to do so, and the constitution does not prohibit it from doing so. *Keyes v. School District No. 1,* 445 F.2d 990, 999 (10th Cir. 1971), *cert. granted,* 92 U.S. 707 (1971); *Gomperts v. Chase,* 329 F.Supp. 1192, 1196 (N.D.Calif. 1971, the Honorable Judge Schnacke presiding); *Bell v. School City of Gary, Indiana,* 324 V. 2d 209, 213 (7th Cir., 1963) *cert. denied,* 377 U.S. 924 (1964); *Jones v. School Board of City of Alexandria,* 278 F. 2d 72, 75 (4th Cir. 1960); *Carter v. Green County,* 396 U.S. 320 (1969); *Shuttlesworth v. Birmingham Board of Education,* 358 U.S. 101 (1958).[8]

(3) *The third issue.*

The School District's policy is to admit approximately equal numbers of boys and girls to Lowell High School. To that end, Lowell admits the approximately 375 boy applicants with the highest grade

[8]Plaintiffs' cases and arguments are dealt with at length in Memorandum of Points and Authorities of Amici Curiae in Reply to Plaintiffs' Memorandum, dated April 25, 1972.

point averages, and the approximately 375 girl applicants with the highest grade point averages. The lowest grade point averages of the boys thereby admitted is .25 lower than the lowest grade point averages of the girls thereby admitted. Plaintiffs complain that the operation of the policy to admit equal numbers of boys and girls thereby discriminates against girls.

The issue is: is it within the School District's discretion to put into effect a policy to admit approximately equal numbers of boys and girls to a coeducational academic high school where the application of that policy results in the school's admitting male students with grade point averages .25 (on a 4-point scale) lower than the grade point averages of the female students it admits?

Conclusion. It is constitutionally within the School Board's discretion to do so, and the constitution does not prohibit it from doing so. *Jefferson v. Hackney,* 40 L.W. 4585, 4588-89 (Sup. Ct. May 30, 1972). *Rinaldi v. Yeager,* 384 U.S. 305, 16 L.Ed. 2d 577, 86 S.Ct. 1497; *Reed v. Reed,* 404 U.S. 71, 30 L.Ed. 2d 225, 92 S.Ct. 251 (November 22, 1971); *Eslinger v. Thomas,* 4 F.E.P. Cases 611, 617 (D.So. Carolina 1971).

This court has been unable to find a logical basis for plaintiffs' acceptance of the District's policy of admitting black and Spanish-speaking students to Lowell if their grade point averages were within .5 (on a 4 point scale) of the cut-off point for other applicants. It would seem that if a policy designed to establish a balance between the sexes is unconsti-

tutional the analgous policy designed to balance the racial mix of students by identical means (lower entrance requirements) would be equally unlawful.

(4) *The fourth issue.*

Have defendants favored Lowell in unconstitutional fashion through the allocation of educational resources to Lowell and to the disadvantage of other institutions within the system?

Conclusion. The method and extent of distribution of educational resources is a matter so peculiarly within the concern of local governmental units that, in the absence of evidence which would even suggest discrimination purpose, we deem it improper for a federal court to attempt to administer such matters. Moreover, we do not believe that it was ever the intention of the authors of the Civil Rights Act to suppose that the district courts should function so as to supervise the manner in which local school districts distribute books or assign teachers. We therefore hold that plaintiffs have not stated any cause of action in this respect.

All sides put the questions in this case in strong language. Plaintiffs say that Lowell "siphons off" high achieving students, and that that hurts their comrades who are left behind. Defendants say that victory for plaintiffs would be a blow for mediocrity, and nothing else. Intervenors say Lowell is open to everyone of every race and every creed; that Lowell provides an opportunity to those who achieve; that in a land of opportunity that opportunity ought to be

provided too; and that if plaintiffs were to prevail that opportunity would be gone for everyone.

This Court need not decide upon the wisdom of the School District's policies with respect to Lowell. The issue before this Court is whether those policies are constitutionally within the School District's discretion. This Court has decided that they are.

Plaintiffs' motion for a preliminary injunction is denied for each of these independently sufficient reasons: (1) for lack of showing of irreparable injury; (2) for lack of equity; (3) because plaintiffs have not shown a reasonable probability that they will prevail on the merits.

Plaintiffs' motion for summary judgment as to the second, third and fourth causes of action is denied. Defendants' motion for summary judgment is granted and the action is dismissed.

Dated: December 18, 1972.

/s/ Lloyd H. Burke
U.S. District Judge

Appendix B

In the Supreme Court of the State of California

In Bank

L.A. 30079

(Super. Ct. No. C 1772)

Antonia Guerrero, et al.,
Plaintiffs and Appellants,
vs.
Robert Carleson, as Director, etc., et al.,
Defendants and Respondents.

[Filed July 30, 1973]

OPINION

Plaintiffs appeal from an order denying their application for a preliminary injunction prohibiting the directors of the State Department of Social Welfare and the Los Angeles County Department of Public Social Services from reducing or terminating welfare payments to recipients who defendants know are literate in Spanish but not in English, unless notice of such reduction or termination was given in the Spanish language.

(SEE DISSENTING OPINION)

The sole issue is whether the welfare authorities are compelled by the Constitution to prepare such notices in Spanish. We conclude that although in appropriate cases the use of Spanish in these and similar notices would be desirable and should be encouraged, it does not rise to the level of a constitutional imperative.

The named plaintiffs are three individuals[1] who had been receiving Aid to Families with Dependent Children (AFDC), a federal-state-county funded categorical assistance program. (42 U.S.C. § 601 et seq.; Welf. & Inst. Code, § 11200 et seq.) Under applicable regulations, recipients of such assistance are entitled to receive "timely and adequate" notice of any proposed reduction or termination of benefits. "Timely" is defined to require that the notice be mailed to the recipient at least 15 days before the action is taken; "adequate" means that the notice must include, inter alia, a written explanation of the reasons for the proposed action, of the recipients' right to request a "fair hearing," and of the fact that benefits will continue to be paid throughout the hearing period if the request for the hearing is made within 15 days. (45 C.F.R. § 205.10; State Department of Social Welfare, Manual of Policies and Procedures: Eligibility and Assistance Standards, § 22-000 et seq. (hereinafter SDSW Manual).)[2]

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[1]A welfare rights organization is also joined as a party plaintiff. For convenience, however, the word "plaintiffs" as used herein will refer to the individual plaintiffs only.

[2]The request may be made after expiration of that period, but in such event the reduction or termination of benefits will be effective throughout the review process.

The complaint alleged that defendants sent notices of reduction or termination of benefits in the English language to plaintiffs; that plaintiffs were unable to read such notices because they are literate only in Spanish; and that plaintiffs failed for this reason to request a fair hearing within the appropriate period, resulting in immediate reduction or termination of their benefits. Although constituting a general denial of plaintiffs' right to relief, the answer admitted that defendants did print some welfare forms in Spanish. It was also stipulated between the parties that the Los Angeles County welfare authorities knew the individual plaintiffs in this case did not speak or read English but did speak and read Spanish; that the authorities routinely make an effort to determine if a recipient is literate in Spanish but not in English; and that if it is learned such is the case, the language handicap is conspicuously noted on the recipient's file.

Plaintiffs' contention—that defendants are constitutionally mandated to give reduction or termination notices in Spanish to those welfare recipients known to be literate in that language but not in English—is based primarily on the due process clause. Plaintiffs concede there is no direct authority for this proposition, but rely rather on Goldberg v. Kelly (1970) 397 U.S. 254, and its progeny. In *Goldberg* the United States Supreme Court held the due process clause requires that a welfare recipient be afforded an evidentiary hearing before as well as after termination of benefits. In the course of its opinion the court observed that the recipient must be

given a "timely and adequate" hearing notice (*id.* at p. 267), but did not spell out the contents thereof in any detail. The notice actually furnished under the New York City law challenged in *Goldberg* consisted of a letter to the recipient followed by a conference with a caseworker. Of this procedure the court merely said, "Nor do we see any constitutional deficiency in the content or form of the notice." (*Id.* at p. 268.) Despite the fact that New York City has a large Spanish speaking population,[3] there is no indication the notice was given in that language to recipients who were literate only in Spanish. Certainly the high court did not hold in *Goldberg* that a termination notice to Spanish speaking recipients is constitutionally inadequate unless it is prepared in that language.

Seeking additional support, plaintiffs turn to both a general and a specific authority on the law of notice. The former is Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, from which plaintiffs quote certain well-known passages on the adequacy of notice necessary to satisfy due process.[4] We have no quarrel with the general principles there enun-

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[3]In addition, the recipients individually named in the opinion (*id.* at p. 256, fn. 2) bore Spanish surnames.

[4]"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations.] The notice must be of such nature as reasonably to convey the required information [citation], and it must afford a reasonable time for those interested to make their appearance. . . . [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." (*Id.* at pp. 314-315.)

ciated, but they are of little assistance in solving the particular problem at hand. Whether the notice here given was calculated "under all the circumstances" to convey the required information obviously depends on an appraisal of those circumstances, an inquiry we shall pursue *infra*.

The specific authority relied on by plaintiffs is Covey v. Town of Somers (1955) 351 U.S. 141, in which a notice of judicial foreclosure for delinquency in paying real property taxes was sent to a property owner whom the authorities knew was mentally incompetent and unable to understand the meaning of any such communication. Shortly after foreclosure the property owner was certified to be a person of unsound mind and was committed to a state hospital for the insane, and a guardian of her person and property was appointed. Reversing the foreclosure judgment, the United States Supreme Court quoted the foregoing language of *Mullane* (*ante*, fn. 4) and ruled that "Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to this requirement [of due process]." (*Id.* at p. 146.)

We agree with this application of the *Mullane* principles, but we cannot fairly equate plaintiffs' knowledge of Spanish rather than English with an unsoundness of mind justifying appointment of a legal guardian. An incompetent may be unable to understand an official notice no matter how it is explained to him. By contrast, the plaintiffs in the case at bar are in full possession of their mental

faculties and are admittedly literate in Spanish; accordingly, they are able without question to understand a *translation* of the notice into that language. The issue, therefore, is whether governmental agencies can reasonably believe that upon receiving the notice plaintiffs will seek and obtain such a translation.[5]

The United States is an English speaking country. Despite California's early Spanish culture, the language of our state government has long been that of the waves of American settlers who migrated here when California joined the Union. Although a declaration that all official writings shall be in the English language (former Cal. Const., art. IV, § 24) was deleted as surplusage in the 1966 revision of our Constitution, section 8 of the Welfare and Institutions Code still provides, as do many of our codes, that "Whenever any *notice,* report, statement, or record is required or authorized by this code, it shall be made in writing *in the English language.*" (Italics added.) Justice Holmes declared a half-century ago "it is desirable that all citizens of the United States should speak a common tongue." (Meyer v. Nebraska (1923) 262 U.S. 390, 412 (dissenting opinion).) And

[5]It may be noted in passing that plaintiffs fail to answer a preliminary issue raised in defendants' brief: learning a new language is a process, not an event. When a non-English speaking person is exposed to the English language, whether by formal study or simply by living in an English speaking environment, he will ordinarily pass through a long gradation of proficiency beginning with the time he knows only his native tongue until he becomes fully bilingual. At what point in that scale does "literacy" in English start and plaintiffs' claimed right to notices in their own language end?

this court recently recognized that "The state interest in maintaining a single language system is substantial. . . ." (Castro v. State of California (1970) 2 Cal.3d 223, 242.)

It is a truism that life is more difficult in an English speaking country for a person who does not speak English; indeed, it would likewise be more difficult for an American living in Mexico who does not speak Spanish. But the difficulty is not limited to understanding a notice of reduction or termination of welfare benefits. It may be felt, in addition, each time the person finds it necessary to deal with fellow citizens—e.g., when he seeks to rent an apartment or buy a house, to purchase food at a grocery or clothing at a department store, to obtain medical care, or to apply for a job. It may also be felt whenever the person has a need to deal with the government or its agencies—e.g., when he seeks to apply for immigration or citizenship, to obtain a driver's permit, to be licensed to conduct a business, to fill out tax forms, or to qualify for social security or unemployment insurance benefits. The government may therefore reasonably assume that such individuals experience strong and repeated incentives either to learn the English language or to develop a reliance on bilingual persons who can translate for them when necessary.

It is also reasonable to assume that in contemporary urban society the non-English speaking individual has access to a variety of such sources of language assistance. To begin with, he may turn to members of his family, friends, or neighbors, who were either

born in this country or received some schooling here.[6] If these prove inadequate or unavailable, he may contact representatives of governmental agencies[7] or private organizations devoted to (1) counselling immigrants, (2) assisting particular nationalities, linguistic groups, trades or professions, (3) protecting individual rights to welfare or other governmental benefits, or (4) furnishing legal aid to the poor.[8]

Finally, the government may reasonably assume that the non-English speaking individual will act promptly to obtain such assistance when he receives the notice in question. We have examined the various forms of notice employed in this case: each is printed on letterhead of the Department of Social Services of Los Angeles County; each is personally addressed to the individual plaintiff, by name, address, and case number; each is obviously an official communication, with boxes checked and blanks filled in by hand; and each is dated and signed by a social worker or similar departmental representative. Plaintiffs repeatedly emphasize that welfare payments play a crucial role in their daily lives. We have no doubt this is so.

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[6]Thus the social worker assigned to the case of Mrs. Varela, one of the plaintiffs in this proceeding, declared in an affidavit that his client had at least three teenage children in her household who speak and read English, and who heard the explanation given to Mrs. Varela concerning her pending reduction in benefits.

[7]For example, the social workers assigned to the cases of two of the present plaintiffs each declared in affidavits that they speak Spanish fluently and gave lengthy explanations in that language to their clients concerning their pending reductions in benefits.

[8]Thus plaintiff Varela declared in her affidavit that she took her notice of reduction in benefits to the "State Service Center" in Los Angeles where a law student explained its meaning in Spanish and helped her prepare papers requesting a hearing.

For the same reason, however, it may fairly be assumed that a welfare recipient would not be so disinterested in his family's livelihood as to simply ignore an official document delivered in the mail which has every appearance of relating to his right to receive public assistance payments.

After reciting the above-quoted (*ante,* fn. 4) demands of the due process clause on governmental notices, the *Mullane* court explained (at pp. 314-315 of 339 U.S.): "But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' [Citations.]" In view of the foregoing "practicalities and peculiarities" of the case at bar, we conclude that it is not unreasonable for the state to expect that persons such as those in plaintiffs' position will promptly arrange to have someone translate the contents of the notice here challenged.[9] Accordingly, prior governmental preparation of that notice in Spanish is not a constitutional imperative under the due process clause.

In somewhat desultory fashion plaintiffs also contend the present system violates equal protection principles. It is argued that to send notices of re-

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[9]It is apparent that such persons, by definition, were able to obtain whatever assistance was necessary to permit them to qualify for welfare benefits in the first place.

duction or termination of welfare benefits in English to recipients known not to be literate in that language is arbitrarily to discriminate against them by creating "a class of recipients who are to be denied aid without being duly and properly informed of the same." The argument begs the question. If, as we hold herein, the notice as now given is constitutionally adequate under all the circumstances, plaintiffs are not denied "due" and "proper" information affecting their right to aid.

Plaintiffs' reliance in this connection on Castro v. State of California (1970) supra, 2 Cal.3d 223, is misplaced. We there hold it would violate the equal protection clause to apply the English literacy voting qualification (former Cal. Const., art. II, § 1) to persons who are literate only in Spanish, yet have access to substantial sources of political information in that language. In so holding, nevertheless, we specifically rejected any suggestion that the state was required by the equal protection clause to provide such persons with ballots and election materials *printed in Spanish*: "Whether such a radical reconstruction of our voting procedures is constitutionally compelled, however, is a separate question. It is clear that the goal of efficient and inexpensive administration, while praiseworthy, cannot justify depriving citizens of fundamental rights. But this does not imply that the state must not only provide all qualified citizens with an equivalent opportunity to exercise their right to vote, but must also provide perfect conditions under which such right is exercised.

. . . California is not required to adopt a bilingual electoral apparatus as a result of our decision today that it may no longer exclude Spanish literates from the polls. The state interest in maintaining a single language system is substantial and the provision of ballots, notices, ballot pamphlets, etc., in Spanish is not necessary either to the formation of intelligent opinions on election issues or to the implementation of those opinions through the mechanics of balloting. It reasonably may be assumed that newly enfranchised voters who are literate in Spanish can prepare themselves to vote through advance study of the sample ballots *with the assistance of others capable of reading and translating them.*" (Italics added.) (*Id.* at p. 242.)

Castro can of course be distinguished on its facts, but the foregoing reasoning is equally applicable here. Indeed, we are faced with an a fortiori case: just as we recognized that our holding in *Castro* "will apply to any case in which otherwise qualified prospective voters, literate in a language other than English, are able to make a comparable demonstration of access to sources of political information" (*ibid.*), so also the rule sought by plaintiffs herein would reach far beyond the present facts. As plaintiffs candidly concede, a decision in their favor could not properly be limited to the AFDC program and the Spanish language, but would also apply (1) to Spanish speaking recipients under any of the other half-dozen categorical assistance programs and (2) to any other language—Chinese or Japanese, Russian or

Greek, Filipino or Samoan—in which a non-English speaking recipient of such assistance was known to be literate, regardless of how small that language group might be.

In addition, it is difficult to see why such a rule would not also extend to any and all official communications to the public required to satisfy due process of law, whether it be summonses, citations, subpoenas, tax forms, delinquency or eviction or foreclosure notices, announcements of public hearings —or, contrary to our assertion in *Castro,* ballots and election materials. Thus in Carmona v. Sheffield (N.D. Cal. 1971) 325 F.Supp. 1341, affd. per curiam (1973) ..... F.2d ....., the federal district court dismissed as untenable an action by Spanish speaking citizens complaining they were denied equal protection because the state administered its unemployment insurance program in English only. The court said (at p. 1342): "In essence, plaintiffs' contention would require the State of California and, presumably, all other States and the Federal Government to provide forms and to conduct its affairs and proceedings in whatever language is spoken and understood by any person or group affected thereby. The breadth and scope of such a contention is so staggering as virtually to constitute its own refutation. If adopted in as cosmopolitan a society as ours, enriched as it has been by the immigration of persons from many lands with their distinctive linguistic and cultural heritages, it would virtually cause the processes of government to grind to a halt. The conduct of official

business, including the proceedings and enactments of Congress, the Courts and administrative agencies, would become all but impossible. The application of Federal and State statutes, regulations and proceedings would be called into serious question." Again the case may be distinguished on its facts, but its reasoning is apposite to our problem. (Cf. also Lau v. Nichols (9th Cir. 1973) 472 F.2d 909.))

We close by taking notice of certain rules and practices of defendant welfare authorities on the subject of adequate communication. In a basic policy declaration the State Department of Social Welfare has fully recognized the importance of communicating whenever possible in Spanish with recipients who speak only that language.[10] Other regulations require

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[10]"The basic responsibility for providing prompt aid and service obviously includes effective communication. Many counties have large Spanish surname populations. For many of these people, Spanish is their primary language and English (if they speak it at all) is a second language. It is essential that documents explaining appeal rights be available in both English and Spanish in these counties. These documents should not only inform the client of his fair hearing rights but also of legal or related services in those counties where they are available.

"Communication is improvd when clients see themselves reflected in agency personnel. Issues growing out of misunderstanding will be reduced if the client's expectancy of being understood is increased because there are people in the department who not only speak his language but who have similar backgrounds and are sensitive to his problems.

"Many counties are moving in this direction. They are developing forms and informational materials in Spanish and arranging Spanish language instruction for staff in the department on department time. Wherever possible, many counties are hiring qualified professional and clerical staff representative of minority groups. In addition, however, long-range planning will be necessary for counties to adequately increase staff proportion of both Spanish surname and other significant ethnic minorities." (SDSW Manual, § 22-203.3.)

that upon a request for fair hearing the county welfare authorities notify the referee of any language disability of the claimant (§ 22-023.23), and that at the hearing an interpreter be provided if necessary (§ 22-049.7).[11] Furthermore, we have noted herein that the state does print some of its welfare forms in Spanish, and that Los Angeles County welfare authorities make an effort to learn if a recipient is Spanish speaking only, and to assign a bilingual social worker in such cases.

Without citation of authority, plaintiffs contend that by so doing defendants have "embarked upon conduct" designed to create a "reasonable expectation" that all future communications with plaintiffs will be in the Spanish language—in other words, that defendants are somehow estopped to continue printing in English the notice here challenged. We do not agree. There is no showing that all or even a substantial portion of defendants' prior communications with plaintiffs were in fact in Spanish. In any event, we view these regulations and practices as good-faith efforts by defendants to do as much as can reasonably be done—within the limits of budget, staffing, and time—to insure that recipients who are not fluent in English are not deprived of their welfare rights solely because of their language handicap. These

[11]Plaintiffs mistakenly rely, however, on a regulation (§ 22-021.2) which requires that the notice of the right to request a fair hearing be written "in language understandable" to the recipient. As the regulation does not say "in *a* language understandable" to that person, the word "language" is here used as a synonym for "English." Thus construed, the regulation means only that the notice in question must be phrased in a simple vocabulary and syntax easily understood by persons of limited education.

efforts are commendable, and we do not doubt they will continue and be expanded as it becomes feasible to do so. For the reasons stated herein, however, they are not compelled by constitutional command, and therefore do not give rise to the constitutional duty asserted by plaintiffs.

The order appealed from is affirmed.

Mosk, J.

We Concur:
Wright, C.J.
McComb, J.
Burke, J.
Sullivan, J.
Clark, J.

DISSENTING OPINION BY TOBRINER, J.

In very recent history various cultural subgroups in our society have demanded that they be accorded a legal status not inferior to that which has long been enjoyed by the dominant element. The minorities have attacked the symbols of discrimination, and, to a large extent, and rightly, have succeeded in demolishing them. The law has reflected the social pressure for equal treatment and afforded to the subgroups a new and more meaningful legal status.[1]

One of the sensitive points of the relationship between the minority and the majority elements has

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[1]See Friedman, A History of American Law (1973) pp. 576-580.

been that of language. In many situations the subgroup has been imprisoned within the barrier of inability to communicate in the English language, and, because of that handicap has been denied fundamental rights. In this regard and in the establishment of the rights of minority groups, the decision of this court in Castro v. State of California (1970) 2 Cal.3d 223 marks an historic and memorable step forward.

In *Castro* we posed the question before us in the following terms: "In this case we are called upon to determine whether that portion of article II, section 1 of the California Constitution which conditions the right to vote upon an ability to read the English language is constitutional as applied to persons who, in all other respects qualified to vote, are literate in Spanish but not in English." (2 Cal.3d at p. 225.) We answered the query unequivocally: ". . . we have concluded that the challenged provision, as so applied, violates the equal protection clause of the Fourteenth Amendment and is, therefore, a constitutionally impermissible exercise of the state's power to regulate the franchise." (*Id.*) Our last words in that case were: "We cannot refrain from observing that if a contrary conclusion were compelled it would indeed be ironic that petitioners, who are the heirs of a great and gracious culture, identified with the birth of California and contributing in no small measure to its growth, should be disenfranchised in their ancestral land, despite their capacity to cast an informed vote." (*Id.*, at p. 243.)

In this case we deal with a more concrete and yet limited application of disqualification of members of a Spanish-speaking subgroup because of their exclusive knowledge of Spanish and corollary lack of knowledge of English. Here we do not encounter electoral disenfranchisement; we encounter, instead, disqualification from welfare benefits. The basis for that disqualification frames a narrow issue. When the administrators *know* the recipient speak Spanish only and when the administrators have *previously orally communicated* with the recipients in Spanish, can the administrators send notices of termination or reduction of benefits in *English*?

Aside from the belief by many social observers that such a practice is quite deplorable, we must weigh it in the scales of procedural due process. Procedural due process is not a matter of absolutes which permits of no distinctions between one situation and the next. Instead, in any particular case the right of the individual to procedural due process must be balanced against the legitimate interests and burdens of the state. We probe it here in light of those considerations.

In Goldberg v. Kelly (1970) 397 U.S. 254 the United States Supreme Court held that recipients of public assistance payments were entitled under procedural due process to an evidentiary hearing before the state may terminate those payments. Although the court did not specify the exact form and content of the termination notice in that situation it did declare that the recipient was entitled to "timely and ade-

quate notice" of a proposed termination. (*Id.* at pp. 267-268.)[2]

We said in Sokol v. Public Utilities Commission (1965) 65 Cal.2d 247, 254 "What is due process depends on circumstances. It varies with the subject matter and the necessities of the situation. (Holmes, J., in Moyer v. Peabody (1909) 212 U.S. 78, 84. . . .) Its content is a function of many variables, including the nature of the right affected, the degree of danger caused by the proscribed condition or activity, and the availability of prompt remedial measures."

I have pointed out on another occasion[3] that a "cornerstone of the structure of due process of law is that the adjudication of a significant right must be 'preceded by notice and opportunity for hearing appropriate to the nature of the case.' (Mullane v. Central Hanover Bank & Tr. Co. (1950) 339 U.S. 306, 313 [94 L.Ed. 865, 873, 70 S.Ct. 652].) Accordingly, the courts have held that due process affords the affected

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[2]The *Goldberg* court did not deal with the issue of whether welfare termination notices to Spanish-speaking recipients must be in that language; indeed, there is no indication that the question was before the court at all. The court did state, however, that the particular means of notice employed by the City of New York—a personal conference with a caseworker followed by a letter from a unit supervisor—were constitutionally adequate. (*Id.* at p. 268.) Although at least two of the 20 named plaintiffs in that case had Spanish surnames (*id.* at p. 256, fn. 2), the opinion does not reveal if any of the plaintiffs were literate only in Spanish. We cannot determine from the opinion whether the City of New York employed caseworkers fluent in Spanish to work with Spanish-speaking recipients or whether the city sent termination notices in Spanish to recipients it knew to be literate only in that language.

[3]In re Tucker (1971) 5 Cal.3d 171, 196 (Tobriner, J., concurring and dissenting).

individual a right to timely and adequate notice in criminal proceedings [citations], in civil proceedings [citations], in juvenile proceedings [citations] and in administrative proceedings [citations]. [¶] The United States Supreme Court 'has consistently made plain that adequate and timely notice is the fulcrum of due process whatever the purposes of the proceeding. [Citations.] Notice is ordinarily the prerequisite to effective assertion of any constitutional or other rights; without it, vindication of those rights must be essentially fortuitous. So fundamental a protection can neither be spared here nor left to the "favor or grace" of state authorities.' [Citations.] In order to be constitutionally adequate and timely, notice must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' (Mullane v. Central Hanover Bank & Tr. Co. (1950) 339 U.S. 306, 314 [94 L.Ed. 865, 873]. . . .)"

In *Mullane* the Supreme Court further specified as to notice: "The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected [citations], or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." (Mullane v. Central Hanover Bank & Tr. Co. (1950) 339 U.S. 306, 315 [94 L.Ed. 865, 873].)

We submit, then, in sum, that procedural due process is not composed of weights of absolute quantities in the judicial scales but rather of relative counters in those scales; the issue turns on the relative importance of adequate notice to the welfare recipient and the corresponding burden to the departments in printing the notice in Spanish. We have pointed out that notice is the very essence of due process.

We need not labor the importance of the deprivation of notice to the recipient or the life and death aspect of welfare relief. As to the burden to the departments, the majority opinion is most helpful; the majority admit: "the state *does* print some of its welfare forms in Spanish." (Opn. *ante,* at p. 15.) (Emphasis added.) If some "forms" are *now* printed in Spanish it cannot be unduly burdensome to print the form of revocation or reduction in Spanish, particularly when the departments are expected to mail the forms only to those whom the departments *know* speak Spanish exclusively and to whom the departments have *previously communicated* orally in Spanish and to whom the departments recognize the importance of so doing.[4]

Since defendant departments have already seen fit to identify Spanish-speaking recipients who are illiterate in English, to assign caseworkers fluent in Spanish to those recipients, and to furnish welfare forms in Spanish, the burden on defendants of printing a single additional form in Spanish—the notice of

[4]See majority opinion, *ante,* page xxviii, footnote 10.

reduction or termination of benefits—would certainly be minimal. Indeed, every apologetic assertion as to that which the departments now do to communicate in Spanish is an argument that it is no great burden to do that which the Constitution requires. We therefore conclude that defendants' present method of notifying AFDC recipients known by defendants to be illiterate in English but literate in Spanish is unconstitutional under the Fourteenth Amendment.

Despite the fact that the departments would be exposed to so slight a burden by sending notices in Spanish but that the recipients would be subjected to so crucial a loss, and despite the fact the scales of procedural due process tip so heavily in favor of plaintiffs, defendants proffer two hypotheses of defense. First, they say it may be reasonably assumed that in any event, the recipients will get the notice translated. Second, an acceptance of plaintiffs' position would lead to a requirement that notices in *all* assistance programs be printed in *all* foreign languages!

As to the first defense, the majority conclude that "the government may reasonably assume that the non-English speaking individual will act promptly to obtain such assistance (in translation) when he receives the notice in question." (Opn. *ante,* at p. 9.) To postulate a "reasonable assumption" that recipients of the notice may seek out a translator is a far cry from finding that the notices *are* "reasonably certain to inform" a Spanish-speaking recipient of the reasons for the reduction or termination of his bene-

fits and of his right to a hearing. (See Mullane v. Central Hanover Bank & Tr. Co. (1950) 339 U.S. 306, 315.)

Two cogent reasons demonstrate why the method of notice employed here is not reasonably certain to inform persons illiterate in English. In the first place, the unwary recipient may not appreciate the need for a translation. Unlike the situation in Goldberg v. Kelly (1970) 397 U.S. 254, plaintiffs may not have had the benefit of a prior personal conference with a caseworker to inform them that reduction or termination of their benefits is in the offing. Moreover, since plaintiffs' personal dealings with defendants have been at least in part through Spanish-speaking caseworkers, and since defendants do print other welfare forms in Spanish, plaintiffs may have been led to believe the notice was simply not important enough to warrant an immediate translation.

Secondly, the recipient may be unable to obtain a translation at all; if he does obtain one, it may be too late to request a hearing within the prescribed 15-day period. The recipient may not be able to afford to pay for the services of translation. Even when free translation services are available, the recipient may lack the time or the transportation necessary to obtain them. In short, placing the burden on the *recipient* to obtain a translation of the notice employed by defendants is not reasonably calculated to apprise him of his right to request a hearing.

As to the second defense, the majority describe a *concursus horribilium* (People v. Crowe (1973) 8 Cal.

3d 815, 835 (Mosk, J. dissenting)), which they insist will attend our approval of plaintiffs' plea. According to the majority, the decision could not be limited to the AFDC program and the Spanish language, but would also apply to all categorical assistance programs and to all foreign languages. Next, the ruling would be extended to all official communications required to satisfy due process. Moreover, and the ultimate horror, the state would be required to conduct all its affairs in every language which is spoken by any person under its jurisdiction. Government would then grind to a halt, disabled by the need to perfectly inform its citizens.

The parade of horrors here, as so often, is no more than a retreat into the irrational. Surely we do not suggest that defendants would necessarily be required to furnish notices in Basque or Chippewa. We have explained in some detail that the application of procedural due process involves the weighing of the state's burden against the individual's benefit; in view of the fact that a *significant number* of California residents speak and read only Spanish and that defendants recognize this fact, since they have taken the commendable steps of providing Spanish-speaking caseworkers and of printing some forms in Spanish, the burden of printing the challenged forms in Spanish would be comparatively light.

Whether the expense and inconvenience of printing forms in other languages of the notices of reduction or termination of benefits would be justifiable must be decided in each case on the basis of the relevant facts.

The state knows which AFDC recipients read only Spanish; the state deals with a sufficient number of Spanish-speaking persons to justify the conclusion that printing notices in Spanish does not compose a special burden. Applying the same practical analysis the state need not print notices in Basque or Chippewa because it does not know which recipients, if any, speak only those languages, and because there are so few of such recipients that the expense of translating and printing the notice would be unreasonable.

We conclude that individuals situated as the plaintiffs before us are constitutionally entitled to notice in Spanish before their welfare payments may be reduced or terminated because the due process protections afforded by such notice are significant while the burden upon the state in providing them is minimal. We reject the implication that such a holding would necessarily extend to other language groups or to all other government communications. Under a different set of circumstances, the balance of interests between individual and state may be entirely different and may accordingly dictate a different result.

We subscribe to the majority's allusion to the enrichment of our cosmopolitan society by the immigration "of persons from many lands with their distinct linguistic and cultural heritages." (Opn. *ante*, at p. 14.) We would insist that those of that group who receive Aid to Families with Dependent Children are entitled to procedural due process as to reduction or termination of welfare benefits, notices which entail

a relatively slight burden to the state, but which are crucial to the recipients.

In the long effort of the subgroups in our culture to attain recognition and participation the majority opinion can only be an unfortunate step backwards.

I would reverse the judgment.

Tobriner, J.